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**Towards a moral account of political obligation
the morality of law as foundation for the requirement to obey**

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Towards A Moral Account of Political Obligation

The Morality of Law as Foundation for the Requirement
to Obey

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Introduction

Political obligation is one of the “big problems” in political theory, one that has elicited concerns for the better part of 20 centuries.¹ Though it would be a mistake to assert that throughout this expanse of time everyone from Plato to Simmons has understood it in the same way, since historical circumstances, previous ideological commitments, social backgrounds, current societal issues, *l'esprit du temps* all heavily influence perspectives on the requirement to obey, a common denominator in the many writings dealing with the relationship between citizens and their institutions is the preoccupation with the source of the supposed duty to comply with the law of one's state. That preoccupation survives to this day, secular experience having proven it easier to start from an assumption of generalized obedience, as practice does, than to vindicate the existence of a particularized moral requirement to obey, as is the aim of moral philosophy.

Much of social and political discourse is centred on this strong conviction that citizens have duties to their countries of birth that others, including those that reside within the jurisdiction but do not hold full citizen status, do not. In scholarship, many pages have been devoted to the meaning and content of citizenship, and to the functions, duties or rights associated with it. Yet its main content – that alleged moral requirement to abide by the state's directives – remains conjectural. Plenty of compelling reasons, from considerations of utility to considerations of justness and morally superior outcomes, can be produced as to why obedience towards the law is, preferable to disobedience; and plenty of reasons why the familiar state is an arrangement superior to all other existing or possible sets of circumstance can be summoned. These abundant motives however have not amounted, either individually or as parts of larger constructions, to an explanation as to why a particular set of institutions can use the law to change the normative status of those in its jurisdiction by dictating, sanctioning, forbidding and controlling their behaviours. “Authorities”, as we know and understand them, have not therefore been shown to be in possession

¹ The term “political obligation appears in the literature in 19th century. Thomas Hill Green was the first to use it in a lecture considering its sources. He defined it as including “both the obligation of the subject towards the sovereign, of the citizen towards the state, and the obligations of individuals to each other as enforced by a political superior”. His intended goal was “to discover the true ground or justification for obedience to law”. See T. H. Green, *Lectures on the Principles of Political Obligation and Other Writings*, Cambridge University Press, Cambridge, 1999, p. 13, p. 14.

of a *right* to our obedience. Paradoxically, the more political theory has sought to add to this pool of compelling reasons, the more apparent it has become that perhaps the best we can aspire to are more modest arguments for authority that settle citizens with duties that mimic, but do not mirror in intensity, generality, permanency, or solidity, the political obligations so readily ascribed to them. Thus, while we can attribute some authority to our states and, on some readings, even some measure of legitimacy, that full right to command interconnected to an obligation to obey from which there is no immunity and no derogation escapes us.

Of course, political obligation is not claimed to be the exhaustive content of citizenship nor is it opined that the absence of a generalized moral requirement to obey equates to the absence of any measure of justified compliance, or to a wide-ranging permission to disobey. There is wide acknowledgement that non-obligated citizens can, and will, have duties towards specific laws, specific co-members, specific institutions at specific times; piecemeal duties are possible and will arise. These lesser duties will not, however, confirm the state as a morally legitimate authority, or entrust it with a power-right over citizens, or show that whatever commands it issues in the public domain are, in and of themselves, normative requirements that function as sufficient reasons for action. In other words, they will not ascertain a special relationship between state and citizen as one between rightful authority and an individual bound to obedience. It is this special relationship that is the “bread and butter” of theorists of political obligation, with the bulk of their efforts narrowing down to attempts to vindicate the idea that there is something exceptional enough about citizens and their actions, or states and their actions, or the way they interact with each other to create and sustain it. “Why them” and “why obedience” are thus the two main questions concerning the problem of political obligation and what justification- the term used to describe all efforts to vindicate the moral requirement to obey-seeks to resolve.

In spite of the lengthy period political philosophy has dedicated to considering the requirement to obey, comparatively few opinions have been embraced to the point of becoming axiomatic beliefs about political obligation. Broad agreement has been reached only on a series of general assumptions about the concept itself, and a list of

features an appropriate account of it should theoretically meet.² These first have come to be considered largely incontestable, and thus act as the building blocks upon which existing theories rest and of which all future theories will have to be mindful.

To begin with, although the moral requirement to obey the law is “political obligation” not all justifications of it need be as straightforward *political obligation*; some are natural duties accounts. This is the result of a theoretical distinction, semantics and a change in the thought on political obligations occurring post Rawls. The theoretical distinction is the one between “obligations” and “duties”. Although orthodox political thought rarely engages in discussions on the two concepts – insofar as they are used interchangeably, both are moral requirements and not much is to be gained from such a discussion – there are some, important, ways in which they are not synonymous.³ Firstly, duties entail a connection with “motives and dispositions” that obligations do not have. As Green and Brandt explain, a moral duty is a duty to act in a specific manner when prompted by certain “motives and dispositions”.⁴ In contrast, an obligation is simply an act an individual *must* either do or abstain from, this act being compulsory independently of the reasons he may have for or against discharging it. In other words, duties rely on a foundation of values, opinions, moral judgements and prompts, whereas obligations are *prima facie* categorical, ignorant of and immune to the above, having to be performed not because they are indicated by wants, moral compasses or evaluations but simply because they have been voluntarily assumed, or because they are the commands of bodies morally sanctioned to issue such commands. The inclinations and primary reasons/motives of purported agents are relevant for the former but not for the latter. The distinction becomes quite clear when considering political obligation: in its case obedience towards the law is mandatory regardless of any and all other reasons individuals may come up with to support or reject the decision to discharge it, including strong opinions that obedience is the right/correct/moral/useful thing to do, fear of punishments or habit. As with any other obligation, political obligation thus binds external acts (acts towards the state, towards other citizens) irrespective of any anterior or ulterior considerations.

² The latter are the subject of chapter I.

³ My view on duties vs. obligations is paradigmatic. Rawls, Hart, Green, Brandt, Simmons, Klosko, etc. all hold the same view, although Brandt’s “The Concepts of Obligation and Duty” remains the most detailed expression of this view.

⁴ T.H.Green, *Lectures on the Principles of Political Obligation and Other Writings*, p. 17.

Secondly, duties are not as conclusive a reason to action as obligations are. Identifying subject “X” as being *obligated* to Y is to say that X must Y and only Y, or else. Conversely, moral duties do not compel the individual to act in certain way, being guidelines for personal and public behaviours, not directives. No punishments similar to those afferent to trespasses against obligations are attached to them. Failures to help the poor, to tell the truth, to participate in rescue operations, etc. are not offences in the same sense as a failure to discharge obedience and therefore are not under the same regime of sanctions and reprimands. Thus, although we may have good and strong reasons to satisfy some particular moral duty, we are not compelled to do so in the same almost inescapable sense that we are obligated to obey the law: that something is law is reason enough to act in consequence and it is not the sort of reason that suffers evaluation, contestation or a choice of inaction outside of extraordinary circumstances. In specific jargon, while the contents of obligations are peremptory and authoritative, the contents of duties are merely pre-emptive. This holds even in the case of “heavy” duties (prohibitions on murder, rape, theft, etc.) that appear categorical and conclusive: it is not their heavy moral content that passes some imagined threshold into legal and moral obligation, it is that it so happens that lawmakers have deemed it necessary to positivise their content into a legal rule.⁵ As such we must not kill not because God demands that we do not or because that prohibition is part of our moral code but, first and foremost, because *law* demands that we do not. Law and political obligation are thus, as known, about musts while moral principles and duties are about *oughts*.

Finally, duties and obligations differ significantly in their scopes. Moral duties are duties that apply to humans qua humans independently of their age, citizenship, gender, religion, race, class, education, etc. In contrast, obligations, particularly political obligations, have a special nature: they belong to certain classes of individuals, in certain places, at certain times and have clear starting points that separate the life of an individual into “before” and “after”. Ensuing to this diversity, to their being ulterior to actual birth, and to their special nature, obligations are not seen as having a moral charge equal to that attendant on moral duties.⁶ In

⁵ “Positivisation” is the term I use to describe law-making on the basis of moral principles, i.e. law making that translates moral norms into legal rules.

⁶ Some discover a category of “special duties” halfway between typical natural duties described above and obligations. These duties are special insofar as they are non-voluntarily assumed, like classic duties, but hold only between special classes/groups of individuals, identically to obligations. They are

consequence, moral and political theories afford the latter regulatory capacity: whatever the obligations individuals assume or are charged with, they must not confront moral duties. Otherwise the possibility of being overridden arises and the individual may be freed of the imperative to perform them.⁷

This is the short and uncomplicated story of duties versus obligations. Practice however looks somewhat different, both because of a semantic issue and because of the Rawls-provoked change in the thought on political obligations mentioned before. The lexical exhaustion brought about by the overuse of the word “obligations” in texts on obedience, and the fact that the dictionary allows the terms to be used interchangeably encouraged the usage of both to describe the requirement to obey, even if conceptual differentiations technically did not allow for it. In the earlier days of voluntary explanations of obedience this was entirely unproblematic, as all understood that whenever the term “duty” was used, it was a consequence of paucity in jargon, not a re-evaluation of the prerequisite of obedience. Once Rawls elaborated on his natural duty of justice as something requiring compliance with the just applicable institutions however – thus effectively making the moral requirement to obey the one way to discharge a duty people have [supposedly] *qua* humans – confusion, or at least the possibility of it appeared. Rawls was very judicious in his handling of terms: he differentiated between the moral requirement to obey upon which the satisfaction of the natural duty of justice is predicated, and the political obligations some individuals have voluntarily acquired; they were identical, but they had different sources. His followers, however, did not embrace this dichotomy. Still, they cannot be said to have abandoned the theoretical distinction. For them, duty vs. obligation was not a question of differences in perspectives about concepts but one of justificatory strategy, asymptomatic as far as actual understandings were concerned. What sets natural duty accounts apart, therefore, is not some alternative opinion on meaning, but a practice of considering obedience to be the particularized conduit to the satisfaction of a superior duty, which departs from the standard view of political obligation as an end in itself. As such, both political obligation and natural duty justifications settle citizens with the requirement to obey, the only difference being

the finds of associativists and communitarians (partially) preoccupied with making morally justifiable claims about what citizens owe each other in the political-legal sense.

⁷ For differences between duties and obligations also see R.B. Brandt, “The Concepts of Obligation and Duty”, *Mind*, Vol. 73, No. 291, 1964, pp. 374-393 and H. Beran, “Ought, Obligation and Duty”, *Australasian Journal of Philosophy*, Vol. 50, No.3, 1972, pp. 207-221.

that the latter presupposes a degree of separation that is not discoverable in earlier strategies. Neither this gap nor any other of the dissimilarities mentioned above are in and of themselves, however, an advantage or an obstacle to these justifications; their success or failure is not in any way contingent on conceptualizations, but on their ability to meet the standards and requirements to be listed in chapter I. What is most pertinent in this discussion then is that obligations – including the one that specifically concerns us – are conceptually predicated on the satisfaction of four conditions: a) political obligation needs be brought about by something, it cannot be considered a “natural state”, b) political obligations need to be owed by specific people to specific people, c) a right has to be generated against the obligees and d) the root of obligation needs to be the act/event/transaction/ “x” itself, not its nature or effects, meaning that an act’s being morally permissible or morally unobjectionable or a source of morally superior consequences cannot and should not be considered the ground.⁸ Outside of these political obligation is fool’s gold.

The second important postulation about political obligation is that justifying the moral requirement to obey means establishing authority as legitimate in the fullest sense. Discussions on the precise meaning of “justification” are conspicuously absent from the texts of those that deal with accounts of political obligation. The term is taken at face-value and defined in pure dictionary terms: when one justifies political obligations, one accounts/ validates why citizens must obey the rules of their states. In “Justification and Legitimacy” however Simmons explains what justification must mean.⁹ He argues that accounting for authority correlated to an obligation to obey amounts to more than showing the state to be morally acceptable, necessary and preferable to all other socio-political arrangements that stop short of requiring obedience from members. Justifying political obligation therefore imposes a demonstration that there is a special moral relationship between the state and its citizens, one in which the former has the right to the uniform compliance of the latter.

Simmons contrasts this Lockean interpretation of the demands of justification with the incorrect Weberian strategy that approaches legitimacy as something predicated upon popular attitudes towards governments, and the Kantian one that

⁸ Also see A.J. Simmons, *Moral Principles and Political Obligation*, Princeton University Press, Princeton, 1979, pp. 11-12. The first condition, which for him necessarily grounded obligation in the performance or “omission” of an act has been adapted to reflect the now more common belief that political obligation can have non-voluntary sources.

⁹ A.J. Simmons, “Justification and Legitimacy”, A.J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press, Cambridge, 2001, pp. 122-158.

aims to demonstrate that an already present and inescapable state is something reasonable people trapped under its authority would obey. Scholars of political obligation have almost uniformly adopted the first, as made evident by their efforts to argue for political obligation as a morally correct connection between the inhabitants of a jurisdiction and the particular institutions that are held to apply to them that is unique in the sense that no other set of citizens or set of authorities have a hold on that specific group that is identical or comparable. This is not necessarily evidence of some underlying adherence to Lockean thought but of awareness of the justificatory mark for political obligation and what can constitute sufficient evidence for it. While common sense discourages the Weberian one (no one examined here aims to make legitimate authority and political obligation contingent on popular opinions), the Kantian interpretation has, however, in some instances, caused issues, insofar as it has facilitated confusions between the threshold for justifications of political authority, and the threshold for political obligation, which is higher. Kantian views on justification – which are married with equally Kantian opinions that states play a determinant role to our elementary rights and duties, that there is a duty of state entry, and that justice is the exclusive ability of the state – are, as we shall see, perhaps sufficient when the goal is to show that well-performing states are entitled to piecemeal compliance, but not when the target is the vindication of a moral requirement. So for the purposes here, including future ones and ours, justification is at all times to be taken to presuppose what Simmons describes, i.e. a demonstration that political obligation is a morally correct special relationship between a group of citizens and *their* authorities.

The third important opinion on political obligation is that it necessarily implies authority and legitimacy, but neither authority nor legitimacy necessarily bring it about or entail it. In modern political thought on obedience, the moral requirement to obey has been predominantly thought to be correlative to legitimate political authority, meaning that any state in possession of a right to obedience settles its citizens with an obligation to obey, and all citizens such burdened with obedience necessarily live under the thumb of a legitimate authority in possession of a morally justified right against them (henceforth the correlativity thesis). Although this is the most orthodox opinion on the perfect relationship between legitimacy, authority and political obligation, the chronic inability to vindicate the existence of a generalized duty of obedience has led to a shift in perspectives on the relationship between

political obligation-political authority-legitimacy and to the opinion that the three are divorceable, in the sense that the former's absence would not inevitably mean the disappearance of authority and, rarely, of legitimacy.

Political authority, that species of authority describing the relationship between states and citizens (or citizens and citizens, on a horizontal view), splits into categories according to nature, claims and justifications. Separation is most often rooted in whether or not said relationship is normative or descriptive. Along this line, practical authority is subsequently to be contrasted with theoretical authority, *de facto* authority with *de jure* authority, authority that claims with authority that is and so on. In this taxonomy, political authority of the kind we actually experience is deemed to be an instantiation of the former, *de facto*, practical authority, that claims and behaves rather than authentically is; and this *could* come to correlate with an obligation to obey on the side of citizens if properly legitimized (by which I mean shown to be in possession of a right, justified in the Lockean sense) but, as of now, it correlates with piecemeal acts of obedience or even with a weak duty of non-interference.¹⁰ Political authority as an ability to impose political obligation, and political authority as an ability to issue authoritative commands, are therefore different, with authorities who can only do the latter subsequently not being denied some entitlement to compliance, but under the caveat that their citizens are obviously not bearers of an obligation to obey but mere subjects of reasonable, intelligible imposition that cannot be upgraded to political obligation on merit, justice, fairness, democratic practice based considerations or other findings of "worthiness". As for legitimacy, it remains truly, first and foremost a property of "true", *de jure* authorities in possession of rights against their citizens, although some scholars are ready not to exclude lesser, *de facto* authorities, from the category.¹¹

In more concrete terms, obedience became a discussion on two levels. On the one hand there were the classical scholars of political obligation – Simmons, Klosko, Horton, Green, Smith, etc. – who continued to embrace the correlativity thesis and

¹⁰ C. Morris, *An Essay on the Modern State*, Cambridge University Press, Cambridge, 1998.

¹¹ William Edmondson holds political legitimacy to be a property of any state that sincerely claims it even if then manages only to impose a duty to abide by its directives when it applies laws in particular cases (*Three Anarchical Fallacies*, Cambridge University Press, Cambridge, 1998, p. 39); his legitimacy does not presuppose political obligation but a weaker duty to cooperate in a state's efforts to resolve disputes. Lefkowitz, on the other hand, views legitimacy as the property of a state that can impose something as weak as a duty of non-interference. Finally Estlund (2007) believes democratic decision-making procedures are sufficient for legitimacy.

held genuinely legitimate authorities to be only those capable and allowed to impose an obligation to obey.¹² When unable to discover a proper justification for that requirement to obey, they advocated philosophical anarchism, a position that deemed states to be illegitimate but held people to owe obedience as the content of other sets of obligations and duties. Others, however – such as Raz, Estlund, Kantian functionalists such as Stilz or Waldron, and defenders of democratic regimes – were inclined to distinguish between fully legitimate authorities and authorities not correlating with a generalized duty to obey but still capable of imposing obedience in a fashion that could mimic the permanency and coherence of the moral requirement.¹³ These are scholars who discovered real states to make understandable, correct claims to authority, who deserve obedience and who, when disobeyed, are unjustifiably wounded in a claim they have against citizens. These states are political formations who have earned submission, by exhibiting some redeeming ability or quality, either by performing their political exercises in a fair, inclusive, democratic fashion, or by ensuring better compliance with applicable reasons when people obey because of the secondary, content-independent reasons they provide; they may not be in possession of a *right* to obedience, but their commands can and do make piecemeal acts of compliance morally required. Thus, they have political authority, just not political authority corresponding to obligation, that perfect species of *de jure* authority.

The accounts these scholars construct reflect these perspectives. While scholars of political obligation treat justification as the answer to a metaphysical question about the circumscription of natural autonomies, accounts of political authority are much more defensive constructions, insofar as their efforts do not explain how people have found themselves in a situation in which they are settled with a duty to obey, but rather observe that they obey and are expected to do so and seek to show that the states on the receiving end of this obedience are entitled to it in a way that approximates to the ideal of authority and legitimacy. Of course, in practice, this differentiation between scholars of political obligation and theorists of political authority is not as clear-cut, with many straddling the line. Raz, for example, thinks political obligation to be realizable only in a voluntarist universe, and thus

¹² Leslie Green explains the correlativity thesis to be a normative statement that one is either a normative condition or the normative consequence of the other and therefore full of justificatory force. See L. Green, *The Authority of Law*, Clarendon Press, Oxford, 1988, p. 236.

¹³ “Kantian functionalists” is a terminology I borrow from Simmons (*Boundaries of Authority*) who, in his turn, borrows it from Stilz; it is a general term designating those who tie authority to the well-functioning of the state and who generally have clear Kantian allegiances.

embraces philosophical anarchism, but at the same time marshals his normal justification thesis as a thesis of authority.¹⁴ In his work the absence of political obligations entails the absence neither of authority (effective authority) nor of obedience; the same could not be said about Simmons or Green, however, even though they start from some of the assumptions. Others, “dip their toes” into both aspects: Christiano writes about a natural duty for respect as a vindication of political obligation and about the majoritarian, inclusive principles of democratic assemblies as a justification for political authority; otherwise, Estlund elaborates on normative consent as an argument for the moral requirement to obey and about democratic practices as a source of legitimacy; Stilz aims for political obligation but arguably moves no further than authority; and Wellman considers legitimacy to be the feature of an inferior state with a liberty-right to enforce and a claim-right to non-interference but not a power-right to create reasons.¹⁵ Variations are therefore abundant.

I do not embrace the correlativity thesis (as a statement about the impossibility of political authority without political obligation), not because there is something inherently objectionable about it but because it is an exaggerated opinion as far as the relationship between political obligation- legitimacy/authority/legitimate authority is concerned. The case has been convincingly made that the inability to account for political obligation does not exclude the possibility of justifiable authority (or, at the very least, of authority justified in its demands). In these conditions, while my account of political obligation brings about *de jure* authority that is legitimate in the fullest sense, I do not deny that morally correct arguments can be made in favour of obedience towards lesser, *de facto* authority. Then, by “*de jure*, legitimate authority” I mean authority morally justified in issuing commands to citizens politically obligated to comply with those commands simply because they are *its* commands. Conversely, *de facto* authority is authority not corresponding to political obligation and blanket compliance, but authority rendered with an entitlement to piecemeal acts of obedience

¹⁴“...the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” See J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford, 1986, p. 53., pp.54-56.

¹⁵ This view is discoverable in: C. Wellman, “Liberalism, Samaritanism, and Political Legitimacy,” *Philosophy and Public Affairs*, Vol.25, No.3, 1996, pp.211–237; W. Edmundson, *Three Anarchical Fallacies*, Cambridge University Press, Cambridge, 1998; A. Buchanan, “Legitimacy and Democracy,” *Ethics*, Vol. 112, No.4, 2002, pp.689–719.

by one of its features, functions or structure. The first, as Rawls explained, can change the normative situation of individuals; the second orbits around sums of justifiable demands. Finally, as far as legitimacy is concerned, I consider it a true property only of authority corresponding to political obligation (legitimacy in the full sense), but I do not reject describing *de facto* authorities' claims as legitimizable in Simmons' Kantian sense (limited legitimacy). Legitimacy without either authority or political obligation seems to me however both useless and unintelligible.

What is most important, however, when admitting that political obligation implies legitimate authority, but that authority does not necessarily imply it, is keeping in mind the threshold for proper justification. Political obligation is justified *only* when it is shown to be the content of a right that a state - that is legitimate in the full sense- holds against the citizens of its jurisdiction, who then have to surrender all judgment for the only and sufficient reason that the state is the source of commands. For those that do not endorse the correlativity thesis it is important to remember that the good, correct reasons they may invoke in defence of authority do not in themselves make for adequate sources of a moral requirement to obey.

Types of Justifications of the Moral Requirement to Obey the Law

Scholars navigate the perimeter delineated by purpose and commonalities in opinions about political obligation in ways that allow for the discovery of trends. Based on the relationship they choose to entertain with voluntarism, and on the element of the explanations they elect to emphasize, the theories proposed so far organize into distinctive schools. According to how they position themselves vis-à-vis voluntarism, three kinds of accounts can be identified: voluntary accounts, non-voluntary accounts, and minimally voluntary ones – whose commitment to voluntarism is more verbal than actual.

Of the three, voluntary justifications are by far the most significant, both in historical and theoretical terms. These types of justifications of political obligation hold, as the name suggests, that the obligation to obey can be traced back to a single intentional act through which the individual has knowingly and deliberately expressed

his desire to be bound. In this category fall the social contract and consent theories of political obligation, and the principle of fairness account in its Rawlsian formulation. Theoreticians of political obligation consider voluntary accounts of obligation to be most appealing, as they are in tune with the orthodox opinion that dictates that obligations, of whichever kind, should be the direct consequences of intentional acts performed by cognizant, rational, intelligent adults. Unfortunately however, they also believe these accounts to have failed to meet their justificatory ends, the type of deliberate actions they endorse as sources of obligations being impossible to discover in real life. For some, the failure of voluntarism coincided with the end of political obligation *tout court*, insofar as they considered will to be the only authentic source of moral duties; these are the scholars that more often than not embraced philosophical anarchism, an opinion on obedience to which the entire architecture of modern thought on obligation can be considered as representing a response.

Minimally-voluntary justifications are typically subsumed within the first, although they clearly exhibit less practical commitment to voluntarism than their predecessors. I suggest a separation because, in spite of the expressed adhesion, the ground of political obligation is of dubitable voluntary nature. There is a systemic fault in these accounts – their consent does not exhibit sufficient intentionality genuinely to act as the authentic source of political obligation. This fault results from decision to alter the concept of consent in hope that would dismiss previous issues arising from inconsistency with reality, on the idea that whatever consent loses in the process can be made up for with a supplementary argument from something else. What they fail to realize is that when consent loses its ability to carry the normative burden on its own, the account degenerates, usually into whatever the supporting contention dictates. Novel forms of tacit consent (residence, voting) belong here.

Finally, non-voluntary justifications are more modern answers to the failure of the first to be reconciled with reality. In contrast to voluntary and minimally voluntary justifications, these explanations of political obligation do not seek to identify any premeditated acts leading to it. Instead, they focus on a special feature of the state or citizens, or on an actual relationship between the two that they consider to hold special status. Associative theories, which derive justification from the attachments citizens have towards their communities and the allegedly powerful meanings and consequences of membership, belong to this group. In this category I also include Klosko's principle of fairness. Although his account is transactional, usually held to

be synonymous with voluntarism, to his mind the allegedly indispensable nature of the benefits provided by the state are enough to generate an obligation to obey, even if the recipients of the goods are unaware that those benefits are the result of cooperation, or that taking these goods will result in them becoming bound to their distributor. The most significant theories in this section are nevertheless natural duty accounts, which use arguments from the just character of institutions, from the equitable provision of freedom, from respect, from procedures, etc. to meet their goal.

As mentioned previously, in and of itself the choice between voluntarism and non-voluntarism is not a predictor or indicator of success; at most, it is a marker of the theoretical and methodological challenges proponents will face. What is more important than the rapport entertained with will is the element justification elects to emphasize as the actual source of the duty to obey, element that needs to be shown to be sufficiently normatively charged to sustain political obligation. Based on this second differentiation accounts fall along the following lines:

- Action-centred accounts: these emphasize supposedly performed acts. In classic consent theory that act is the deliberate express or tacit consent through which one conveys one's desire to become a part of the community. In reformist consent theory the act can be a decision to continue to reside in the country of one's birth or a decision to vote. Hypothetical consent accounts distance themselves from claims of actuality, instead marshalling contentions that the acts can be assumed to have been performed or would be performed, in certain conditions. Finally, in the Rawlsian principle of fairness account, such act is a voluntary acceptance of cooperative benefits.
- Status-centred accounts: these are accounts that stress the important status of citizens, and the rights and duties that flow from this privileged position. Associative justifications derive political obligation from this sort of argument.
- Benefit-centred accounts: they concentrate on the many goods states provide us with or on the indispensability of state-delivered goods to living an "acceptable life". Political obligation is consequently seen as either a debt of gratitude (gratitude theories) or as the fair cooperative repayment for benefaction (Klosko's principle of fairness).

- Duty-centred accounts: Accounts that hold obedience to be the way to fulfil the requirements of a duty (justice, samaritanism, etc.), or consider it to be proper reciprocation for some well-performed function or an instantiation of respect for the interests and opinions of others fall here.
- Multiple grounds accounts: these are the least popular accounts of political obligation. They are a product of the past few years, having appeared as a response to the inability of scholarship to defend single-ground explanations of the types described above. Some have responded to this inability by delivering hybrid theories that blend two or more explanations (arguably Gilbert, though she insists on her associativist credentials). Others observe both this failure and the fact that citizens interact, position and respond differently to law and consequently maintain that, given these, a pluralistic approach makes sense (Klosko 2005, Knowles 2010). These latter justifications build on the idea that there is nothing inherently objectionable about believing that, within the same state, political obligation can have different sources. Accordingly, their proponents contend that in state X some citizens will be bound because they have consented while others will be so because they have accepted benefits or because they have genuine affections towards their co-citizens and state, and so on. Multiple grounds theories have not gathered any momentum or supporters. Although political theory reminds scholars of political obligation not to assume that a single ground will be able to explain the bound of each and every citizen, the underlying intuition about multiple principle accounts is that they are a *de facto* recognition of defeat in the quest to solve the problem of political obligation. The opposition to them is therefore largely one “on principle”, although these patch-on arguments are not only susceptible to criticisms addressed to composing parts but also to aggregate ones as well.¹⁶ Thus, as far as the future is concerned, the “big problem” is not whether or not argument can be combined into a coherent explanation that can navigate misgivings but whether, given the general-case nature of political obligation, and the standard opinion that law demands the

¹⁶ So, for example, multiple principle accounts that combine elements of principle of fairness with natural duties and/or consent will not only fall prey, separately, to all the typical criticisms addressed to fairness, natural duties and consent paradigms, but also expose themselves to crippling questions about the coherence of arising duties, about their distribution among the citizen body and so on.

same of all and all have to respond to it in identical fashion, it makes theoretical sense to aim for plurality.

Given that all these kinds of justifications are held to have failed their attempts to achieve justification, it could seem unfair to categorize some as being weaker than others. Still, insofar as we can distinguish between theoretical failures and failures in practical execution, a hierarchy of sources of normativity is possible. In this pyramid, arguments from will obviously occupy the top spot: moral philosophy's opinion of individuals as free agents dictates that their obligations should be, optimally, the result of their deliberately performed acts. All others compete for a distant second place, with some narrowly rescuing defeat from the jaws of victory (Klosko's principle of fairness) while others can be deconstructed claim by claim or are superlatively far-fetched.

Their uniform failure is something established here definitively. I hold my original contribution to political theory to be two-fold. First, I definitively demonstrate that we are at the end of justification of political obligation as we know it, insofar as the familiar paradigms purporting to account for the moral requirement to obey are precluded from achieving that goal not only by whichever errors and inconsistencies are discoverable in each specific instantiation, but also by structural flaws that pervade and poison the justificatory strategies themselves; I show that extant approaches not only fail but will always necessarily fail, because there is something wrong with the underlying logics that guide them. Secondly, in response to these observed failures, I propose an entirely novel justification I hold able to survive the charges that have crippled preceding arguments. This ability derives from the fact that, instead of focusing on extracting evidences of or from will, transactions, horizontal attachments or duties whose content is allegedly obedience, it draws on the nature of the so far ignored third element of the special relationship of obedience – the law.

Intent and Structure

My argument is directed not only at those that have attempted to vindicate political obligation with accounts along the familiar lines, but also at those who

propose lower level accounts of political authority without a correlative obligation to obey, or who abandon political obligations in favour of philosophical anarchism. The first are meant to understand that their strategies are faulty *ab initio*, in as much as the chosen source of normativity is either insufficient, or theoretically sound but inconsistent with some aspect of reality or of the mandatory criteria, or a combination thereof; they should become aware that not only have they missed the justificatory mark, but their persistence in attempting justification through the familiar patterns will necessarily continue to yield negative results *because* of the weakness of the chosen ground itself. The second interest me more narrowly as a third option lodged between the ideal vindication of the moral requirement to obey bringing about legitimate authority, and the capitulation that is philosophical anarchism. They and their opinions are of relevance to political obligation mostly as cautionary tales about the dangers of (a) misjudging a chosen ground as a sufficiently strong source of political obligation when it is only adequate for the lower goalpost of *de facto* political authority, and (b) confusing the requirements of a Lockean justification for a Kantian one. Finally, philosophical anarchism is a school of thought we are implicitly addressing whenever discussing obligation. As a general opinion on obedience, philosophical anarchism is theoretically uninteresting, insofar as its rejection of a generalized obligation to obey does not imply a permission to disobey or a denial that obedience may routinely be brought about by other factors, ranging from considerations of utility to superior moral consequences to applicable duties. I do not find philosophical anarchism of the kind most modern political theorists marshal to be problematic: it is a tenable conclusion – or at least *a posteriori* philosophical anarchism open to the possibility that obligation may be explained by paradigms other than voluntarism is – reached after years of evaluations that have revealed that the requirement to obey remains unjustified; rushed perhaps but certainly endorsed by evidence. Consequently, I do not stop to isolate its faults, as William Edmundson endeavours (*Three Anarchical Fallacies*) or identify any great merits and lessons, as Magda Egoumenides (*Philosophical Anarchism*) does: a successful defence of political obligation automatically entails a rejection of philosophical anarchism, while the lessons purportedly provided by it amount to recommendations for thresholds for authority, obligation and legitimacy that only express consent could potentially pass and that impose adherence to the correlativity thesis; the first is thus unnecessary, the second an instance of theoretical purism of the kind that is out of place in this context.

Philosophical anarchism therefore makes for a target, but a particularly meek monster at the edge of the map.

The structure of this thesis reflects my intentions. In chapter I I explain what kind of right is the one the state is in possession of against its citizens by appealing to the classic Hohfeldian typology and to some of Applebaum's comments. I reject, however, the discussion on whether some rights correlate to liabilities rather than obligations as an uninteresting and unhelpful instance of splitting hairs: in typical moral theory discourse the object of a right against is in a position of duty vis-à-vis the right holder, and I adhere to this practice. In the same chapter I I also set the criteria justifications must meet, as well as a list of precepts, warnings, standard objections and opinions political theorists have to observe when performing this kind of effort. Here I borrow significantly from A.J. Simmons, the foremost scholar of political obligation, who not only helped shape our common understanding of the concept of political obligation but was also instrumental in establishing stepping stones and red flags in justification. Others contribute as well, points of theory from Klosko, Horton, Knowles and Egoumenides that I have found to hold universally being included in the package of prerequisites/observations alongside my own. Together they provide methodology in construction and evaluation, and ensure that justifications are uniformly held to, and assessed according to, the same set of standards. Importantly, they also provide a guideline for future attempts, with new proposals having to navigate the perimeter they set up. In simpler terms, in the first chapter I set out the rules by which the justification game has to be played, i.e. unaffected by dispositions, theoretical inclinations or moods.

In chapter II, I begin my examination of existing theories with voluntary accounts of political obligation. After opening remarks on Lockean express and tacit consent as instantiations of the paradigm that are [by and large] theoretically impeccable but undiscoverable as recurring in political life, I focus on modern interpretations of the latter. I first show Beran's tacit consent as residence to not be an authentic option in a morally permissible choice situation. Then I examine Plamenatz's tacit consent as voting and find it to be a failed account that confuses the giving of consent with the practice of selecting occupants of unjustified authoritative positions through ballots, and that is guilty of a faulty logic that considers voting to be a creator of obligated citizens rather than part of the collection of rights and duties people held to be citizen-role occupants are settled with. Finally, in the closing pages

I analyse three versions of hypothetical consent, as provided by Pitkin, Murphy and Estlund. I reject the first as an incomplete Kantian thesis of authority that misses the justificatory mark for political obligation, the second as a faux argument from consent that mixes elements of Rawlsian natural duty with rudiments of Raz's normal justification thesis that genuinely makes no further progress towards political obligation than the first, and the third as an exemplary case of what happens when intentionality and knowledge are removed from consent – damage that renders the concept barely recognizable, let alone capable of sustaining duties of the magnitude of political obligation. In the second section of chapter II, I perform the same analysis in respect to principle of fairness theories. Hart's principle is first rejected as an incomplete account that settles neither what counts as a cooperative venture nor, most importantly, how membership and corresponding obligation are acquired. Rawls' principle is then found to correct some of the original faults – in ways that are evocative of his preoccupation with justice – but his argument from acceptance as a source of membership, benefaction and obligation, though theoretically sound, is shown to be as inconsistent with reality as express consent. The issues with Klosko's principle, however, are not as clear-cut, since this is the best expression of a fairness account and most likely the best account *tout court*. I conclude my analysis of the principle of fairness with an assessment of this incarnation. The principle entertains no connection with will but that is unproblematic insofar as Klosko explains convincingly that his principle falls outside of the voluntary-non-voluntary dichotomy. This renunciation of any distinguishable connections with deliberateness will nevertheless prove costly even though it solves issues related to membership and consistency with reality, since Klosko has to show (and fails to do so) that obedience is the only morally unobjectionable form of fair reciprocation. That, accompanied by a host of other more (alternative supply) or less significant issues eventually proves to be crippling. At the end, I draw the conclusion that no intent-based account will provide an appropriate justification: consent that does not verify in reality, or meet its elementary features, does not have the normative force to sustain political obligation, while principle of fairness reasonings removed from intent are highly unlikely to exclude, definitively, forms of reciprocation other than obedience as unfair in a morally impermissible sense. These, I conclude, are transactionalism's systemic faults.

In chapter III I deal with non-voluntary justifications. Arguably the weaker theories, associative accounts of political obligation can be faulted along identical lines: a practice of comparing the relationship between citizens with familiar or friendship relationships and attempting to extract duty from that, a refusal to consider the probability that role obligations are not rooted in the relationship/association as such but in the moral principles and corresponding natural duties governing them, a practice of awarding attachments normative powers, and a generalized inability to construct arguments obviously distinguishable from natural duty accounts. I show all these to be problematic by examining the criticism to which they expose their proponents. I first assess the conceptual argument, a proto version of the associative account that rejected interrogations about political obligation as a failure to understand the meaning of citizenship, and hold it to be un-academic and wilfully blind to the logical gap between questioning supposed role obligation and questioning the role itself. Then I consider Dworkin's associative account, an argument that, amongst other errors, exemplifies associativism's failure to hold associations to be genuinely the root of obligation and not degenerate into alternative accounts. Margaret Gilbert's joint commitment justification and communitarian opinions on associativism, obligation, identity formation and normativity are subsequently explored: Gilbert is found to commit a series of errors resulting (generally speaking) from a proclivity towards confusion, whereas communitarians' error lies in their decision to endorse two theses that contradict our common-sense observations about the human psyche and standard moral theory opinions about higher order moral principles and their powers. Finally, I argue that John Horton's account exhibits all the defects of the others, apart perhaps from a less manifest tendency towards degeneration. I conclude that associativism cannot cope with or free itself from accusations of parasitism, confusion or unchecked proclivity towards arguing from unsubstantiated assumptions, and that ultimately it cannot thrive as a justification of political obligation because a) normativity cannot be extracted from something as conjectural, confused, fickle and diluted as attachments for fellow citizens and b) because obligations, especially of the strength of political obligation, are not justifiable on some Wittgenstein-like argument from the meaning of supposedly emotionally charged roles. These beliefs and practices are associativism's systemic faults.

The bulk of chapter IV is dedicated to natural duty accounts. Part of the earlier wave of responses to the miscarriages of voluntary and non-voluntary accounts of political obligation, they follow similar lines, which allows for blanket criticisms. I open my counter-argument with an examination of Rawls's natural duty of justice and then follow with an appraisal of Stilz's natural duty of justice as equal freedom, Christiano's duty of respect and Wellman's duty of samaritanism (most significant justifications in their respective categories) before finding them to be unsound in two crippling ways; their inability to show obedience to be the exclusive content of the duty, and their inability to secure particularity and, as such, morally sanitize restrictions in applications. In this chapter I also briefly engage with Kantian functionalists' accounts of *de facto* authority, as they often mimic, accompany or degenerate from natural duty constructions. Insofar as they are not accounts of obligation but specifically of authority without it [political obligation], they are uninteresting, but they do serve in showing that arguments from well-performed state functions can only take one as far as vindicating piecemeal acts of obedience and thus underline the need to properly consider the strength of arguments. I end the chapter by holding natural duty accounts to exhibit systemic faults that are unlikely to be resolved in a manner that does not morally offend, and suggest that a justification of the moral requirement to obey that draws on the moral nature of law may be able to eschew the issues discovered previously.

In the final chapter V I propose a new account of political obligation derived from the fact that law provides and regulates moral entitlements and responsibilities to citizens it traps into new moral relationships, with itself and each other. I first announce that I hold the law to be moral and explain what I mean (and do not mean) by this, the core contentions being that, much like us, the law is a moral entity and agent, and that its moral status is not conditional on law's effects and content. Then I address the fact that "the law is moral" is a sentence with different meanings in legal theory, and defend it against legal theorists that would regard it as a rejection of the dominant perspective on law, positivism.¹⁷ I follow by defending my claim about the

¹⁷ Positivism (legal positivism) is a theory of law that holds all law to be source-based. According to them law's existence and content is determinately entirely by social facts, and not by moral merit. H.L.A. Hart, Jules Coleman and J.Raz are among its foremost proponents. In chapter V I explain why my statement on the nature of law is not as incompatible with positivism as it would seem to hard-line positivists, such as Raz. I find that my view is, in fact, compatible with more moderate positivism but acceptance is not something I seek. The political theory of political obligation is not interested in what the law is beyond mandatory.

nature of law from hard-line positivist opinions that hold it toxic to their credo that all law is sourced based, and legality is not conditioned on morality. I do so by showing a) their separability thesis- that holds there are no necessary connections between normative system law and normative system morality- is flawed, insofar there are, in fact, necessary connections between the two, and b) that holding the law to be moral is consistent with imperfect, immoral or amoral laws, and with the opinion that legality can be discovered even when the connection to morality is hard to spot. I conclude on the statement as being correct, even reconcilable with a less orthodox version of positivism, and not committing us to any school of thought on law that may fail to pass the test of modernity. Once done, I argue the law, vindicated as a moral agent, is the sort of thing that can be owed moral requirements, and construct a case in favour of the idea that law is owed obedience, first in a limited sense as a fellow moral agent, and then in the sense of political obligation. I then show that my account meets all the conditions set in chapter I, including the authoritativeness condition orthodox positivist thought jeopardized by claims that the law is moral. In this direction, in the final pages, I insert myself in the debate between exclusive legal positivism and the inclusive branch, in order to show that my claims about the moral nature of law do not prevent the account from allowing law to retain this feature, and perform whatever epistemic functions law may hold. I conclude by recommending the study of the law itself as a potential avenue to justified political obligation.

Some final practical considerations are in order. I use the phrases “political obligation”, “moral requirement to obey”, “duty”, “obedience as a right against”, “right against”, “compliance in my sense”, “compliance corresponding to a right against” to refer to the moral requirement to obey and to the content of the moral/political-institutional obligation people have towards their states (sometimes in the plural form of political obligations); in chapter IV, where I discuss the difference between accounts of the requirement as political obligation and accounts of it as natural duty, “political obligation” is in italics. Similarly, I use the term “obedience” (or “compliance” or “submission”, here treated as perfectly synonymous) to refer to both the content of political obligation and to the consequence of political authority without political obligation; context will reveal what I mean, and when discussing obedience brought about by lower, *de facto*, political authority, I will qualify it as “piecemeal”, or refer to it as “compliance **simple**”. I have already explained my views on different species of authority and what appear to be degrees of legitimacy, and the

relationship between the two concepts and political obligation. Suffice it to add the term “authority” simply refers to authority over subjects of political obligation in all contexts but those where the topic at hand is the *de facto* political authority of states not in possession of a right against their citizens (context makes it clear). Connectedly, as mentioned, I distinguish between “fully legitimate”, “legitimate in the fullest sense” or “legitimate in my sense”, by which I mean *de jure*, legitimate political authority corresponding to political obligation, and “legitimizable”, “legitimate in the lesser sense” and “legitimate not in my sense” to describe *de facto* authority. Vocabulary wise, I often use “moral wounding/wounds” or “morally harmed/harmed” to refer to the fact that a made argument or contention harms a right, entitlement or claim an individual or group of individuals has or may have *qua* human(s); “mutilating” is the term I employ to refer to the practice of altering (in fashion that chips away at normative strength) concepts.

Finally, I exclude from analysis gratitude theories, which misjudge the relationship between law and citizenry, utilitarian claims, since they run against the axiomatic opinion “that which is useful does not create obligations”,¹⁸ and multiple principle accounts from analysis, who exhibit all the faults of their component arguments.

¹⁸ Gratitude theories (A.D.M Walker, W.D.Ross) argue as if state-delivered benefits were favours for citizens. This is an inaccurate portrayal of benefaction as well as an argument that ignores that favours are a two-party affair; states, however, do not single out individuals for favouritism but conduct identical relationships with all, as demanded by law that imposes equality and equal treatment. This aside, all criticisms made against benefaction accounts count against them as well.

Chapter I: Methodological Considerations

Political Obligation: A Power Right

In the introduction political obligation was defined simply as a moral requirement to obey the law of the states with which citizens are burdened in particularized fashion; these citizens are held to be under an institutional duty to comply with whatever legal pronouncements their governing institutions issue. This brings about interconnected questions about the object of obligation, how it can be described and what it can be said to be in possession of. The first is easily resolvable: the constrainer is a legitimate authority, defined in the context of politics as a morally justified source of authoritative commands receivers have to perform for no other reason than their being issued by the applicable authority.¹⁹ This hold the authority has over the obligated is generally considered to be a Hohfeldian right, a morally justified entitlement a party has of another. That said, exactly what kind of Hohfeldian right is it?²⁰

Undoubtedly it is not a liberty-right. A liberty-right would allow a state no more than an ability to enforce law and would create on the side of citizens no more than a weak duty of non-interference in the former's affairs – in other terms, *S would be at liberty to X and C would be at liberty to do anything except bar, preclude, or interfere with S's X-ing*. This contradicts our ordinary way of understanding and discussing authorities and their relationship with those they purport to command, as well as the way authorities describe themselves. A state in possession of a liberty-right would be a state whose pronouncements are, by and large, warnings aimed at citizens to not get in its way; they would not create reasons for actions, impose any duties or bring about any measure of legitimized compliance. On the most charitable interpretation, this state would be a glorified administrator.

¹⁹ L. Green, *The Authority of State*, Clarendon Press, Oxford, 1988, pp. 41-42.

²⁰ In Hart's logic this right is a "moral right" of the kind that exists only in contexts where restraints are to be imposed on one's individual freedom and autonomy, a restriction that requires moral justification. Hart explains that whenever a moral right is established an obligation is necessarily established as well, and vice versa. See H.L.A. Hart, "Are there any Natural Rights?" in *The Philosophical Review*, Vol. 64, No. 2, 1955, pp. 175-191.

The second interpretation of the state's hold against its citizens is as a claim-right. This has been the predominant interpretation of political authority in Hohfeldian terms. On this reading *S has a claim to C's X and C has a duty to S to X* with C therefore being under an obligation that, if not discharged, would bring about a breach of duty and thus cause harm to S. This equation appears to be a proper translation of the relationship of political obligation as we understand it. It is, however, problematic in two ways. First, on accounts in which obedience is the way to bring about the satisfaction of some moral principle (fairness) or natural duty it would not be obvious that what S has a claim over is unequivocally compliance; given that fair, just, respectful, rescuing, etc. behaviours could materialize in forms other than obedience, it is not at all clear that S's claim is to submission *specifically*. Citizens may owe duties of justice or respect or samaritanism and S may have a rightful claim to acts that are conducive to their realization, but, insofar as acts other than obedience can bring them about, S's claim could not be to law abidance or to law abidance *exclusively*.

Secondly, this interpretation does not fully account for the state's moral pretences. In this category of "moral pretences" are included states' desires to inflict their moral judgments, to regulate citizen behaviours beyond what is *stricto sensu* necessary for order and other state delivered services, or to create new, content-independent reasons for action with an actual moral charge. Political authority as a claim-right does not put the "moral" in "moral requirement", in "moral obligation" and, in the case of non-compliance, in "moral wound"; in other words it is not obvious that the duty citizens are under, or the reasons they have been provided with, have actual moral charge beyond what authorities typically claim about themselves, *pace* Raz. In these conditions, this reading arguably explains legal obligation, but not the kind of moral obligation that political obligation is.²¹ Consequently, authority as a claim right is better suited to describe real world contexts devoid of actual justifications for the moral requirement to obey, in which states enjoy some imperfect measure of legitimacy and can create piecemeal duties but not impose obligations. Authority as this type of right is therefore *de facto* authority with believable,

²¹ M. Kramer, "Raz, Reasons and Requirements", *Ethics*, Vol. 109, No. 2, 1999, pp. 375-407; H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy*, Oxford University Press, Oxford, 1982, chapter 6.

intelligible and, in some measure, justifiable claims to citizen obedience but not more.²²

The final interpretation of the right to rule is as a power-right. This is the strongest perspective, the holder of a power-right being an entity that can change the normative status of an individual by saddling him with moral rights and duties at will, an entity that can create conclusive, content-independent reasons for action that apply regardless of the balance of reasons, the subjects' opinions and desires and (to some extent) even ulterior moral considerations; correspondingly, a violation of the power-right is an act of moral aggression that is wrong in the legal sense, immoral in the moral sense and, outside of extraordinary circumstances, unjustified.²³ The state S that has a power right against C is a state that also has immunity from other states S1, S2, S3, etc., third parties that cannot intrude in the relationship between it and the subjects of its power to alter or obstruct its impositions and claims. A body politic in which institutions are in possession of this power-right and immunity is therefore the felicitous political community in which genuine political obligation exists and people have an incontestable moral obligation to comply. This power-right is then the goal of justifications of the kind we are evaluating, with the first two [types of rights] being the bar for lesser authority without generalized political obligation arguments.

In practical terms this attempt to inscribe authority in one of Hohfeld's boxes is neither of great help nor of great hindrance, given that what genuinely matters is that, at the end of justification, there are no doubts about particularized law's fulfilment of the authoritativeness condition (people having to do what the law demands because it is law that demands it), it is ascertained that the content of obligation is surrender, and derogation from compliance is permissible only in rare instances when superior moral reasons interfere and annul *pro tanto* ones. The final thing to be mentioned here is that, lately, Applebaum and Perry have opined that, if

²² Raz explained *de facto* authorities in *The Morality of Freedom* as authorities that only make claims to this status and to legitimacy. J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford, 1988, pp. 27-28. William Edmundson thinks legitimate political authorities would fall here but, given our inability to vindicate political obligation, actual authorities are in possession of a protected liberty right. W. Edmundson, "Legitimate Authority Without Political Obligation", *Law and Philosophy*, Vol.17, No.1, 1998, pp. 43-60. That law makes claim to authority and that these claims are moral in nature are, of course, opinions pervasive to legal and political theory. Raz is best known for his ideas on law and its claims. See Raz, *The Authority of Law*, pp. 153-157; Raz, "Hart on Moral Rights and Legal Duties", p. 131; Raz, *Practical Reason and Norms*, pp. 123-129, pp. 162-177; Raz, *Ethics in the Public Domain*, pp. 317-318.

²³ Raz also describes legitimate authority as a power right in *The Authority of Law*, Clarendon Press, Oxford, pp. 3-33. Authority as a power to "change the normative situation" of the individual is the way Raz influentially defined the concept in *The Morality of Freedom*.

the ability to settle citizens with a burden of obedience is best understood as a power in Hohfeld's logic, then this power correlates to a liability, rather than a duty. Furthermore, to be liable to be placed under an obligation is not the same as actually being under an obligation.²⁴ While this may be *stricto sensu* true about the correspondences imagined by Hohfeld in his typology, it is not a line of argument conducive to any solution. As a point of theory, liabilities are not really the objects of moral discourse. In this type of discourse bearers of moral requirements are moral entities burdened with obligations and duties, according on the manner of acquirement. Conversely, it is in legal discourse that the legally obligated are under liabilities under which they might –or might not- be put. There is an inescapable dimension to obligations that liabilities do not presuppose, or to which, in better terms, they do not rise. The failure to discharge the requirements of an obligation in a way permitted by the criteria of justified disobedience is undeniably immoral (even if only because a right holder was wounded in his claim), whereas the non-performance of a responsibility set by a liability is a civil or criminal infraction, but not necessarily wrong or immoral. In other words, breaches of liability are harms under common law whereas disobedience is first an immoral, unjustified trespass, and only then an action that may presuppose legal sanctions. There is also the added factor of unmet liabilities triggering both sanction and remedies whereas disobedience can presuppose sanctions but not reparations, immoral actions being the sort of wounds that, once caused, are there permanently. Moreover, the requirement to obey the law as a liability robs it of some of its assigned moral character, possibly up to a point when legal obligations and moral obligations become indistinguishable, not in terms of content but as categories of duties. Liabilities, therefore, pertain to more mundane laws of contracts, torts, civil wrongs, etc., whereas obligations and duties of the kind with which we are concerned belong to the moral domain in which we operate. And, as a final consideration, if it were true that power rights trigger liabilities, not duties, and being under a liability is not the same as being the bearer of a duty, then what would that entail about the problem of the moral requirement to obey the law? Assume here the ideal situation of political obligations brought about by express consent. If the power-right against these consenters does not presuppose a full-on, clearly voluntarily

²⁴ A. I. Applebaum, "Legitimacy without the Duty to Obey," *Philosophy and Public Affairs*, Vol. 38, 2010, pp. 215–239; S. Perry, "Political Authority and Political Obligation", *Faculty Scholarship Paper* 417, available online at http://scholarship.law.upenn.edu/faculty_scholarship/417

acquired obligation on the former's side, then what could settle them with an actual requirement to obey? If expressed will can, in the best-case scenario, only produce liability, then obligations become fantastic.

To conclude on this issue, political obligation corresponds to the legitimately authoritative state in possession of a power-right against its citizens. Conversely, *de facto* political authority is authority in possession of a claim-right to acts of piecemeal obedience. Differentiations in terms of behaviours may be minimal, but moral ones are not.

In the **Introduction** I stated that there are general features that attempted explanations of political obligation must meet. In the following section I list the criteria for a proper justification (by which henceforth I mean a justification that settles individuals with a conclusive duty to obey and entrusts the state with the Hohfeldian power right described above). This list is definitive and holds regardless of justificatory strategy, relationship with voluntarism, chosen source of normativity, philosophical orientation and so on. Consequent to the [by and large] axiomatic nature of the criteria, all evaluations are performed on their basis, and the failure to meet one is generally considered to bring about failure altogether. This ensures fairness, uniformity and structure in a field of moral theory that stands to benefit from more methodological rigour. To this list of prerequisites I also join some general recommendations as to the practices, assumptions or ideas justifiers should avoid. These are the sorts of things hiding behind a veneer of acceptability or common sense that nevertheless reveal themselves to be problematic at best and utterly toxic to vindication at worst. If heeded alongside the set of indicated criteria, future efforts of justification should considerably outperform preceding attempts.

Methodology

The first and most basic feature of a proper account of political obligation is generality (C1).²⁵ Generality here ought to be taken to mean near uniformity – a justification should ensure that the proposed source of normativity covers nearly all those held to have to obey the law of the state, thus vindicating the legal system's

²⁵ Political obligation is a contentious field, with little collaborative effort; the following lists comprise the things scholars of political obligation agree upon, and all the things they should agree upon. Together they are the "lessons" of past efforts in this field.

claim to impose itself over that specific group of people it legally recognizes as belonging to its jurisdiction. This criterion therefore ensures that law and obligation are both comprehensive in application, thus making the requirement to obey legal rules the “standard case” within a body politic. Generality has proven to be not much of a theoretical issue, as chosen grounds typically cover all legal members of a state, but it has been a practical one, as is to be seen in the discussion on voluntary accounts.²⁶

The prerequisite of generality is married with the one of universality (C2). Universality is achieved when the chosen source of duty can be found to produce political obligation for, broadly speaking, any group of citizens towards all applicable laws.²⁷ In practical executions of justification universality is often qualified with a caveat that the state must be just, reasonably just or at least reasonable in its treatment of citizen in order to be allowed to hold a right against them.²⁸ While not erroneous, the ideal should continue to be to provide an explanation of political obligation that verifies everywhere, including places that fall outside of the perimeter of acceptability prescribed by liberalism, with any moral issues arising from this broader inclusion being made up by the caveat that citizens should be awarded reasonable access to disobedience (C3). This reasonable access translates into a permission to engage in civil disobedience and to non-comply in situations when superior moral considerations interfere and justify a course of action other than the one identifiable in law, or in situations when the state can be shown to act as an aggressor that no longer protects and secures lives, liberties and possessions.

This “reasonable access to disobedience” is evocative of the fourth requirement of retaining political obligation’s *prima facie* nature (C4). Political obligation provides citizens with strong but not conclusive reasons for action, i.e. reasons to act as indicated in law, without consideration for any individual or tertiary reasons for or against said action agents may come up or be provided with, in all cases

²⁶ Generality is a prerequisite for: A.J. Simmons, *Moral Principles and Political Obligations*, Princeton University Press Princeton, 1979, pp. 55-56; G. Klosko, *Political Obligations*, Oxford University Press, Oxford, 2005, p. 10; J. Horton, *Political Obligations*, Palgrave Macmillan, New York, 2010 p. 10; D. Lefkowitz, “The Duty to Obey the Law”, *Philosophy Compass*, Vol. 1, No. 6, pp. 571–598, 2006, p. 572; M. Egoumenides, *Philosophical Anarchism and Political Obligation*, Bloomsbury, London, 2014, p. 24; and others.

²⁷ See Lefkowitz, “The Duty to Obey the Law”, p. 572; William Edmundson, “State of the Art: The Duty to Obey the Law”, *Legal Theory*, Vol. 10 No.4, pp. 215–259, 2004, p. 216; Egoumenides, *Philosophical Anarchism and Political Obligation*, p. 24.

²⁸ As John Rawls famously demands in *A Theory of Justice*; so does George Klosko in *Political Obligations*, p. 9.

except those of the kind described above as allowing for non-compliance. A citizen's moral requirement to obey is therefore not a perfect obligation from which there are no morally permissible derogations – it is not absolute, the requirements in law being defeated by reasons both mentioned and unmentioned in law.²⁹ Although this may seem to conflict with regular views on how citizens do and should interact with the domain of law, this *prima facie* character is advantageous: advocates of political obligation can champion a moral requirement to obey the law that is universal and permanent without risking brushes with the irrational or the immoral by claiming that there are and can be no exceptions to the rule of obedience. Political theorists have almost uniformly retained this feature, the only notable departure in speech being Joseph Raz's opinion that legitimate *de jure* authorities provide exclusionary reasons for action, thus exceeding our normal way of speaking and understanding the moral requirement as well as our normal way of perceiving the relationship between competing moral principles, which awards higher order ones regulative and overriding powers, including the one to sanction acts prohibited by law.

Law and its reasons are the content of another important criterion, which for the sake of brevity I call 'the authoritativeness of law' (C5)³⁰: a proper account of political obligation preserves the authoritative character of law by underlying "because the law said so" as the permanent bottom-line reason why citizens perform an action prescribed through it. This is achieved, simply, by allowing no gap in the theory that is or can be construed as making obedience contingent on a process of evaluation (in terms of utility, superior consequences, etc.) or of deliberation; law's reasons must remain content-independent. In other words, law that is genuinely authoritative is law whose reasons are not only first order categorical but also second order pre-emptive, eliminating the permission to consider and act according to the results of consideration. This is not to say that law aims to remove or ban beliefs altogether: its authoritativeness is not affected by an agent believing that imposed

²⁹ Classic political obligations scholars such as Simmons and Klosko describe law's reasons as being not conclusive; Raz however uses the language of exclusionary. Assuming "exclusionary" to be the superlative of decisiveness I suggest the moral requirement to obey be denied this attribute, rather than conclusiveness. Terminology however matters less as long as it is understood that moral duties and obligations do not "exhaust the subject matter of morality", as Simmons puts it (*Moral Principles and Political Obligations*, p. 25), and that political obligation is not an all-things-considered duty, there being situations in which it will impose compliance, and situations in which it will be annulled by better reasons.

³⁰ Lefkowitz, "The Duty to Obey the Law", pp. 572-573; Egoumenides, *Philosophical Anarchism and Political Obligation*, p. 25; Edmundson, "State of the Art: The Duty to Obey the Law", p. 217.

actions are effective, correct, superior etc., as long as the reason for acting in the specified way is that the law has commanded it. Law retains this feature in all accounts of political obligation that hold citizens must unquestionably, uncritically, invariably obey in all scenarios in which their behaviours intersect with the domain of law (apart of the exceptional circumstances); the only exception are utilitarian accounts, which fall altogether and immediately because of their practice of tying compliance to considerations of utility.

The sixth feature of a correct justification is arguably the most important, and also the one most likely to cause issues in situations in which the source of obligation is non-voluntary and non-associative-particularity (C6).³¹ This fundamental belief about political obligation is a common sense one that a moral requirement to obey the law can only be owned by specific citizen groups to specific states. This requirement has been consistently emphasized since the late 1970s, mostly in response to non-voluntary accounts of political obligations, at the time principally marshalled by John Rawls. Restricting the discharging of political obligations according to existing jurisdictions had been a non-issue in clear voluntarist contexts; consent to one's state, benefaction from one's state, utility in one's state obviated particularity. That would not continue to be the case with non-voluntary justifications, especially natural duty ones: when political obligation became the predicate of a natural duty, it automatically invited questions about the moral correctness of restrictions through borders, the possibility of wounding in exclusion, the permission to opt in or out of states and so on. It became clear that while political obligation need not be a special relationship arising from transaction, the state still had to be shown to be in a [morally unobjectionable] privileged position vis-à-vis the citizens it purported to command. Justifications of political obligation need to ensure that obedience reflects the reality of compartmentalized authority, particularity being not the sort of thing that can be assumed or regarded as a theoretical luxury. In its absence, best-case scenario a successful account will bind some theoretical group of people to a theoretical state but every real border will be, for reasons later explained, an instance of potential moral aggression. Failure to demonstrate particularity is synonymous with an inability to show real world jurisdictions to be morally permissible and justified and thus consequently brings about crippling concerns regarding the possibilities of over-

³¹ Uniformly required by all; Simmons, *op. cit.*, pp. 31-35; Klosko, *op. cit.*, p. 12, Egoumenides, *op. cit.*, p. 24; Horton, *op. cit.*, p. 10; etc.

inclusion/under-inclusion, and exposing every claim to obligation, or absence thereof, to counterarguments from moral wounds and aggressions. This must not be taken as far as claiming that advocates of political obligation need provide a justification of the territorial rights of states; but they must show that existing legal jurisdictions (i.e. such as they are, without the need to morally sanitize history) to be morally justified in the restricted enforcement they practice. “Because they’re there”, “because they were born there” or because “law’s efficient there” do not make for proper -in the moral sense-arguments.

The final two criteria are two common sense demands designed to facilitate justification. The first is a Horton-introduced criterion of conformity (C7) that stipulates that justifications should not marshal contentions that may come to conflict strongly with any of the “features of ordinary thought” (strong intuitions, convictions, feelings, attachments, etc.).³² This can be further explained as a requirement not to attempt to ground obligation in claims that contradict our empirical observations of the real world or experiences, or in a principle that obviously does not encapsulate and reflect citizen-state rapports and interactions. The underlying purpose of this criterion is thus to keep justifications and their claims realistic, important in a field where disconnect from the observable political realities of the world brought about the failure of the theoretically perfect consent theory. Simply put, it precludes rooting political obligation in statements farfetched, wildly optimistic or pessimistic or otherwise inconsistent with practical realities. The final (C8) prerequisite is the criterion of non-triviality, designed to discourage punctiliousness and gratuitous criticisms questioning political obligation in contexts in which obedience is morally insignificant or in which legal considerations should rise but do not, or do and should not, and so on.³³ This precondition is mostly a reminder that situations in which moral arguments for obedience will be hard to gather do not count against political obligation as a generally applicable concept. In other words, that moral arguments in favour the obligativity and enforceability of the order that bans bringing Polish potatoes into Britain may be hard to conjure does not undermine the claim that this law is obligatory or the standard case of obligation. Being trivial or insignificant, as a law, is not derogation from compliance; and non-enforceability does not signify

³² Horton, *Political Obligation*, p. 9.

³³ In more concrete terms, this means not drawing any conclusions about the obligativity of law from observations that insignificant or out-dated or bizarre laws are sometimes ignored and/or ignored but not sanctioned (a classic example is the traffic light in the middle of the desert).

derogation, permission to disobey. This being said, issues of triviality do not arise and, really, cannot arise, as the authoritativeness condition by and large eliminates them on the “because this is what law demands” argument.

The picture these criteria paint of political obligation is the one of an institutional duty that holds exclusively but generally over all the legal subjects of a jurisdiction who must comply with the authoritative commands of applicable institutions independently of any distinguishable or indistinguishable moral merit discoverable in the content of law whenever superior moral demands do not sanction disobedience. This is not to say, however, that an account meeting all the criteria set above is necessarily successful: Klosko’s principle of fairness struggles with none of these yet is still uniformly considered to have failed. Equally important to how justification is performed is *the content* of the justificatory opinion.

One of these pitfalls is improperly estimating the normative strength of the chosen ground of obligation (hereby CO1A_{sufficient-normative-strength}). Although, again, there is nothing inherently objectionable about arguments from multiple sources, a successful account of the moral requirement to obey will marshal a ground that is valid for all citizens, so as not to invite any questions of gaps or inconsistency and the likes. In spite of justifiers invariably claiming to defend a single ground account, there have been occasions where supplementation was required and, equally invariably, this resulted in the poisoning of arguments and pretences. The consequences of normative additions cannot be minimized or glossed over: first and foremost they obviate the fact that the designated ground is incapable of sustaining obligation on its own; then they introduce additional [correct] misgivings about degeneration [into other paradigms, henceforth CO1B_{non-degeneration}³⁴]; and the auxiliary claims introduce, in their turn, subsidiary criticisms. It is a vicious circle from which there is no escape because, regardless of all else, there is clear proof that the chosen ground is inadequate. This automatically vindicates critical arguments that either a) the defender is actually marshalling a multi-principle account prioritizing an argument that visibly cannot sustain obligation meaning, at the very least, that one category of citizens will be absolved from political obligation; b) the proposed account is simply an instantiation of another one masquerading as an alternative

³⁴ The term I choose to use to describe an argument’s collapsing/deteriorating into another paradigm.

justification; or c) the contended for vindication is theoretically uninteresting insofar as other competing explanations organize some [all] of the same claims into neater, more direct, better performing arguments. The necessary conclusion for evaluation in these situations is then rejection: a proper justification of political obligation rests on a unique, clear, non-derivative ground that sources political obligation in a cause and effect logic. Further, there is the added consideration that a proper account is a straightforward, shortest-route affair, meaning that in situations when supportive elements are introduced justifiers need to ascertain that they actually collaborate with the designated ground. If they compete, the element that more rapidly and more unobjectionably invites considerations of political obligation will “win”, rendering the original source useless and thus condemning the account to a diagnostic of degeneration. To be clear, the point here is not that theoreticians of political obligation should steer clear of multiple principle accounts or that justification is not achieved unless the ground justifies the political obligation of literally every citizen, but rather that they must ensure the declared ground can actually sustain obligation, no matter if for everyone or just a subsection of citizens.

A second pitfall is discovering sufficient force to change the normative situation of an individual in evaluative findings, such as “just” or “delivering of justice” (CO2non-foundational-justice/quality).³⁵ The fact that something is just does not in and of itself create an obligation to submit. At most, it could provide individuals who decide to go along with a moral justification for their wilfully committed acts they can however stop at any time without wounding “the just” in a right it may have against the agents. The reasons why this is so are the moral, conceptual and logical gaps between “should” and “must” and our ordinary way of approaching individuals as agents free to occupy positions of moral neutrality and immorality. As for justice, it often leads to issues lethal to justificatory efforts when married with Kantian opinions that the state is necessary for achieving it or that states are determinant to our basic rights and duties. In our context, these issues will prove to be an inability to show that the content of a duty of justice (no matter what public conception of it operates *in situ*) is obedience towards the state, and incapacity to establish particularity. In clearer terms, the supposed fact that the state is just or necessary for justice does not obviously entail that a) people must submit to the requirement of justice, b) people

³⁵ Justice in “CO2non-foundational-justice” can be replaced with any quality.

can only fulfil the corresponding duty by obeying the law, exclusively and c) that the distribution of justice and alleged corresponding duties distribute along borders in a morally permissible way.³⁶ In chapter IV, it will become obvious that proponents of such arguments have no answer for the first and the contentions they marshal to resolve the second are weak and have great potential to cause moral harm. The warning to be heeded here is that it needs to be proven, not assumed, that the fulfilment of a duty – any duty – is contingent on compliance and that this duty can be narrowed down to match borders. Justified political obligation is incompatible with doubts about contents and precise inclusion (CO3_{precise-districting/inclusion}).³⁷

This latter issue of correct districting is particularly salient because common sense so easily misleads into thinking that actual borders make for morally unobjectionable compartmentalization of obedience. Theory, however, demands that political obligation be defended as a special relationship in which the state has the upper hand over *specific sets of individuals*. This presupposes a proper argument for specificity. Specificity (particularity) is not only something that must not be assumed, but also something that requires a foundation with sufficient moral charge. Natural duty paradigms often believe an argument from birth or proximity to be sufficient. Their logic however awards random facts of life excessive moral force: though birth may hold some moral meaning it does not obviate the existence of a unique relationship with artificial political institutions as powerful, permanent and demanding as the moral requirement to obey; moral theory disallows accidents of fate having these kind of consequences. Similarly, proximity is a weak argument attempting to establish a moral relationship on the basis of literal geographic juxtaposition coupled, occasionally, with a claim from efficiency that may be of some help when the goal is political authority, but not when aiming for political obligation, distance making for an even weaker source of “specialness” than birth. Particularity and correct districting/inclusion therefore requires a reason that is sufficient, strong and unobjectionable.

The other condition from precision concerns content, specifically the moral requirement to obey the law as being the precise, unique content of a duty, or its

³⁶ Egoumenides captures the spirit of this when she writes that accounts of political obligation must show that institutions have to be obeyed “as they require to be obeyed”, Egoumenides, *Philosophical Anarchism and Political Obligation*, p. 25

³⁷ “Districting” is A.J. Simmons term; he uses to refer to dividing people and territories into jurisdictions with precise borders. A.J. Simmons, *Boundaries of Authority*, Oxford University Press, Oxford, 2016, chapter 3.

precise, unique predicate. Natural duty accounts- and Klosko's principle of fairness-run into an unfortunate issue of managing to establish that something is owed (arguably) by citizens to fellow citizens or overarching institutions, but not that the "something" they owe necessarily is political obligation; they assume that justice, rescue, fairness are contingent on compliance, not show that they are. And if the space between "should comply" and "people owe compliance" is enormous, so is the one between "people owe" and "people owe compliance exclusively and specifically". Call this requirement to establish political obligation as the firm content CO4precise-content.

Moving on, regarding this special relationship political obligation is morally and theoretically thought to be, a routine occurrence in the thought on political obligation is basing the power-right against citizens in supposed attachments presumed by membership roles within the larger [alleged] associative structure commonly referred to as the state (CO5non-generational-assumptions-from-attachments). This has proven to be a mistaken policy, attachments being rejected as proper sources of obligation on counts that they are unstable, inexistent or arguably confused and manipulated, while arguments from roles are rejected as Wittgensteinesque opinions blind to the possibility that governing moral principles may play the determinant part in engendering afferent duties, and to the logical gap between finding meaning and finding sufficient justification for presupposed actions. What this practice has made abundantly clear is that attempting to extract political obligations from claims of care and comparisons with paradigmatic affective relationships is destined to fail because, besides the theoretical faults that are discoverable, the claims themselves are unrealistic. These yet again make obvious that maintaining a discernible connection with the features of the real world is important in justification: broad, sweeping, naïve, or overly pessimistic/optimistic statements about citizens, the state, the relationship between them or the context in which they operate are not only not helpful, but can contribute decisively to rejection, especially when joined at the hip with obfuscating the difference between actual consent-justified entitlements and mere practices of going along with the demands of *de facto* authorities (CO6non-confusion). Political obligation is not an issue of or resolvable by interpretation.

Two other issues concerning this special relationship need to be paid attention to when attempting to justify the moral requirement to obey the law. Unlike the standards discussed above, these tie in the converse issue of "too much" duty. One is

a warning not to allow theory to bind so strongly to obedience that concrete opportunities for reasonably disobeying or opting out [or proving to have opted out] disappear (CO7_{not-too-much-duty}). This has almost uniformly not been an issue, the only exception being Klosko's principle of fairness, who outlines a burden of showing that one is not on the receiving end of excludable goods that is so heavy that there is ample space to doubt that it could ever be discharged, making his account a transactional construction from which one of the parties could not extricate itself through methods other than immigration. Klosko's opinion, however, becomes genuinely problematic only when taking into account the larger context, one which denied alternative supply in the face of realistic, believable claims that bodies other than the states can and do deliver goods required by acceptable lives (CO8_{accounting-alternative-supply}). This second counterargument from alternative supply affects justifications deriving political obligation from the alleged fact of the state being the unique source/distributor of things inherently and instrumentally valuable, such as public goods and justice. It belongs in that category of problems arising from assumptions that are either contradicted by reality or that suffer considerable probing. In this latter aspect, claims about justice are particularly vulnerable, given that it is not at all obvious that no other arrangement, political or non-political, is or can be conducive to it, or that it is obligatory to receive justice from "our" state (whatever that may mean), as opposed to from another one, or the most just, or some other formation of our own creation; and, as is to be seen, arguments from the provision of indispensable goods perform similarly poorly in the face of this crippling charge, unable to demonstrate exclusivity either as a fact of life or as the only possibility, and therefore unable to alleviate misgivings about the possibility of morally objectionable coercion, of variable subjection, and so on.³⁸

The discussion here draws on broad agreement in academia on what political obligation is, and what a justification of it should presuppose – a moral requirement to obey the law that corresponds to a state-held right which can only be explained through an account that meets the eight criteria set out here and, in the practical execution of its demonstrations, (1) avoids rooting obligation in a weak or insufficient

³⁸ The only thing to add here would be not to lose track of the intention behind efforts of justification: the goal is to see if we *must* [theoretically and morally] obey, not whether- on the practical side of life- we *should* continue to comply. Concrete behaviors vis-à-vis practical authorities are not the subject here.

ground that requires strengthening with ancillary arguments, or (2) relies too heavily on assumptions that are unverifiable, go against standard opinions in moral theory, or generally contradict empiric observations about political life.

In the next chapter I show how transactional accounts – from Lockean tacit consent to Klosko’s non-voluntary principle of fairness – fall short of meeting a series of the requirements expressed here and consequently miss their justificatory targets. My main claim against consent theory is that its original fault of entertaining no discernible connection with mundane political realities is gradually transformed into issues of erosion and degeneration arising out of the modern practice of mutilating the concept by distancing it from its original knowledge-deliberateness-intentionality conditions in order to make up for earlier sins. As for the principle of fairness, I show that it too replaced an earlier problem of non-conformity with problems of imprecise content, alternative supply and arguably even of degeneration. My conclusion is that both exhibit structural faults that decisively preclude present and future manifestations from vindicating the requirement to obey. In doing this I track how the accounts fare in regard to the criteria and conditions mentioned above; a crossed out criterion or conditions means that it has failed to meet.

Chapter II: Transactional Accounts of Political Obligation

Consent Theory

In the Introduction and the first chapter I have elaborated on the source and meaning of the term “political obligation”, described what are the main points of agreement on the topic, established a methodology for justification and evaluation by setting out the precepts and criteria it ought to meet, explained that this obligation is most correctly seen as corresponding to a Hohfeldian power right, set my goal to demonstrating that available paradigms are structurally flawed and the consequent imperious necessity to discover new sources of normativity, and provided a chapter-by-chapter summary of the thesis.

In this chapter I set out to prove that transactional theories of political obligations – the heading under which agent-centred consent and principle of fairness theories are grouped – fall short of justifying the obligations to obey for a broad class of people. I first discuss the core tenets of these theories. Then I start to assess their different instantiations with a view towards establishing how they fare vis-a-vis their goal. To finish, I draw a general conclusion as to their success. The structure of the chapter reflects these intentions. In the opening section I review the consent theory of political obligation. After a few brief introductory comments on the fundamental features of the concept of consent and on the obvious failures of the express variation, I focus on classic Lockean tacit consent. Once I find this to miss the justificatory mark (for reasons very similar to those that have led to the collapse of express consent) I turn my attention to the two modern versions of “reformist consent”: as residence and as voting. My main argument against them is that, in spite of appearances, they do not amount to actual consent to becoming bound, as their proponents either discover will in contexts moral theory disallows from identifying as authentic choice situations, or misinterpret the subject of conveyed desire and are consequently incapable of generating political obligation. Following this, I explain that the tools of consent are later employed by hypothetical consent defenders and show that they too fail to account for the moral requirement to obey, these accounts being sabotaged by an inability to see that consent that does not exhibit its basic features is not consent that can sustain political obligation. I draw the preliminary

conclusion that consent theory, in any of its guises, can no longer raise any claims to having justified the duty to obey of real people, before moving on to part II, which is dedicated in its entirety to the principle of fairness. The pattern I follow there is identical to the one employed before. I examine all three versions of the principle, Hart's, Rawls and Klosko's, and find that, though compelling in its second and especially third form, it still falls short of explaining political obligation in a way that does not conflict with our basic realities or, importantly, shows obedience under obligation to be the exclusive content of fair repayments. At the end of the chapter, based on the counterarguments formulated against these explanations, I conclude by deeming them unsuccessful and structurally flawed.

Tacit Consent

When stripped of the mental experiments of the state of nature and of social contract, consent theory remains a model of justification that rests on four pillars. First, "man is naturally free", and thus incapable of acquiring political obligation simply by virtue of being born. This conviction is best encapsulated in the following quote from Locke's *Second Discourse*:

"Men being, as has been said, by nature, all free, equal and independent, no one can put out his estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bounds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties....".³⁹

Secondly, an individual can divest himself of his natural freedom by "giving a clear sign that he desires to do so".⁴⁰ Much like the making of a promise, obligation can arise out voluntary, intentionally and knowingly made acts that belong to the class of performances known (both by their agent and by external observers) to generate

³⁹ J. Locke, *Two Treatises of Government*, Cambridge University Press, Cambridge, 1988, p. 330.

⁴⁰ A.J. Simmons, *Moral Principles and Political Obligations*, Princeton University Press, Princeton, p. 64.

duties.⁴¹ Thirdly, consent protects citizens from their governments by preventing them from unintentionally and unknowingly becoming bound to them (irrespective of the morally unobjectionable or just nature of those authorities), and by introducing the caveat that consent no longer applies when states begin to hurt those who have given it to them.⁴² Finally, consent theory holds that a state that has been consented to is one that protects the interests of its citizens, by which is meant that citizens cannot become or be held bound to unjust, unfair governments even if they have, past or presently, consented.

This list of tenets shapes *consent* as a performative act that alters the normative situation of the individual by generating rights-against him and new moral relationships on a purely voluntary basis limited [perhaps] only by the caveat that he must not be allowed to will himself worse off.⁴³ Consent theory thus immediately reveals itself as a justification with four clear merits: (1) being perfectly in tune with the idea that individuals are capable, autonomous beings that must be allowed to determine their lives through independent actions and decisions; (2) moulding itself on the heavily supported model of promises, thus guaranteeing that obligations are always intentionally, voluntarily and knowingly assumed; (3) preventing obligations from being inadvertently acquired or imposed;⁴⁴ and (4) establishing a clear, simple, sufficient ground of obligation.⁴⁵

That express consent (EC), the open declaration of submission that makes “him [the individual] a perfect Member of that Society, a Subject of the Government”, fails to account for real political obligation is obvious:⁴⁶ given that only a minority of

⁴¹ The connection with deliberation and intentionality is very important in classical consent theory. See H.M. Hurd, “The Moral Magic of Consent”, *Legal Theory*, Vol.2, pp. 121-146. Richard Flathman writes that for consent to happen the consenter must “know what he consents to, intend to consent to it, communicate his knowledge of what he is consenting to and his intention to consent to the person to whom consent is given”. R. Flathman, *Political Obligations*, Atheneum, New York, 1972 p. 220.

⁴² Simmons, *Moral Principles and Political Obligations*, p. 66.

⁴³ Terminology borrowed from J. Raz, “Authority and Consent”, *Virginia Law Review*, Vol. 67, No.1, 1981, pp. 103-131, pp. 120. W. Edmundson also stresses this point. He believes one of the main credits of consent theory is its ability to give the law moral power and to close the gap between moral reasons and moral requirements, thus making the “consenter morally required to do what she is not independently morally required to do”. See W. Edmundson, “Consent and Its Cousins”, *Ethics*, Vol. 121, No.2, 2011, pp. 335-353, p. 337.

⁴⁴ Carr calls this “the internal ethics of consent”. C. L. Carr, “Tacit Consent”. *Public Affairs Quarterly*, Vol. 4, No.4, 1990, pp. 335-345, p. 338.

⁴⁵ See Edmundson, “Consent and Its Cousins”, p.338; Simmons, *Moral Principles and Political Obligations*, p. 69.

⁴⁶ Locke, *Two Treatises on Government*, pp. 347

people (comprising those that have been sworn into office, new citizens, and not many others) have ever performed such declarations, express consent cannot source a duty to obey general enough to allow a discussion on a blanket bind to obedience within a state; it fails completely to meet ~~C1generality~~ ^{C7conformity}. In these conditions, express consent had to be, and was, set aside in favour of its tacit cousin, examined in the next section. This examination will show that tacit consent is capable of sustaining political obligation in neither its more honestly Lockean form nor in any of its modern ones, precluded from success first by a tenuous connection with the realities of political life (~~C7conformity~~) and later by more theoretical faults having to do with the concept and its features themselves.

- ***Lockean Tacit Consent (TC)***

Locke was not particularly generous in his description of tacit consent. Unlike the express consent that clearly removes the declaring individual from the state of nature, makes him a member of political society, and binds him to obedience towards the government of that particular society, tacit consent has a more subtle nature and, as we shall see, more mysterious effects. Quoting Locke:

“... the difficulty is, what ought to be look’d upon as tacit Consent... And to this I say, that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far forth obligated to Obedience to the Laws of the Government, during such Enjoyment, as any one under it; whether his Possession of Land...or a Lodging only for a Week; or it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government”.⁴⁷

The simplest reading of this first paragraph is that tacit consent, understood as something inhabiting the space between owning property within the confines of the

⁴⁷ Locke, *Two Treatises on Government*, pp. 347-348.

state and simply living or travelling within its borders, makes one obligated to obey local laws for as long as he or she is there.⁴⁸ Locke later writes, however:

“But submitting to the Laws of any Country, living quietly, and enjoying Privileges and Protection under them, makes not a Man a Member of that Society... This no more makes a Man a Member of that Society, a perpetual Subject of that Commonwealth, than it would make a Man a Subject to another in whose Family he found it convenient to abide for some time...Nothing can make a man so [subject of a government] but his actually entering into it by positive Engagement, and express Promise and Compact”.⁴⁹

Locke appears to first claim that tacit consent, in the form of possession, enjoyment, living, etc., binds one to obedience, albeit temporarily, towards the laws of the state; then however he writes that, unlike express consent, these sorts of things do not actually make one a member of society. The propositions appear to be at odds. This contradiction nevertheless is likely to be deceptive. Perhaps it is simply the case that tacit consent obligates one to obedience without going further and making that person a “perfect” member of society as well. It may very well be that Locke distinguishes between having a temporary duty to obey and being a full member of the community that is also *perpetually* obligated to obey.⁵⁰ In this scenario, express consent generates full membership *and* obligation whereas tacit consent merely produces an obligation that begins with enjoyment/possession and ends when the two are no longer experienced – possibly on account of departure from the lands, possibly on account of death. This uncertainty about *how much* consent makes one a full member of society or not is nevertheless a largely toothless issue. The main issue is that Locke believed traveling, residence, “enjoyment” to be capable of producing political obligation, a belief that not only comes into conflict with some of consent theory’s basic commitments (which Locke himself had set, no less) but also fails to verify.

⁴⁸This latter time limit is a caveat introduced by the phrase “during such Enjoyment, as any one under it”. This places tacit consent in contrast to express consent, which holds forever. Locke, *Two Treatises on Government*, p. 349.

⁴⁹*Ibid.*, p. 349.

⁵⁰I. Hampsher-Monk agrees. Iain Hampsher-Monk, “Tacit Concept of Consent in Locke’s Two Treatises of Government: A Note on Citizens”, *Journal of the History of Ideas*, Vol. 40, No.1, 1979, pp. 135-139.

The obvious issue here is that Locke appears to forget that he originally tied consent to knowledge and intentionality and begins to discover it in acts devoid of these attributes. It would have been unproblematic if he had clarified his claims to be statements that certain acts – owning, enjoying, living – can constitute tacit consent in appropriate, known circumstances. But he did not. To restore Locke to full voluntarism A. J. Simmons writes convincingly that:

“..... nearly any act can, given suitable background conditions including the right sorts of convention, be one whereby a man expresses his consent. Locke is saying rather that, in modern states at least, these acts necessarily constitute the giving of tacit consent. In other words, such acts are always signs of consent, irrespective of the intentions of the actor or his special circumstances”.⁵¹

If this is true, then Locke’s tacit consent, as it is on first reading, “violates” the knowingly, willingly and deliberately conditions of obligation engendering consent: if a certain act X is to produce political obligation for an individual, the individual must be aware of the significance of the act, know that it will result in him becoming bound and still be willing to perform it. Passive and unthinking owning or living within a state do not obviously imply any of the above; they are not consensual in the sense Locke arguably intended. In consequence, they cannot be taken as signifying consent or as resulting in obligation; at most, they could perhaps be said to be indicative of a desire to go along with whichever political arrangements are in place. Confronted with this, Simmons suggested an interpretation of his writings that could potentially rescue them from fault by harmonizing with the features consistently ascribed to consent in the *Second Discourse*: tacit consent as a silent mode of expressing approval that has consequences just as binding and meaningful as any open declaration of agreement.

This consent is, arguably, more Lockean than pure Locke, belonging just as much to Simmons as it does to the English philosopher. He builds the argument in favour of this reading of tacit consent on an example of board members who, when asked by their Chairman if they object to holding the next meeting on Tuesday at 8 o’clock, say nothing. In this particular set-up the silence and inactivity of those asked

⁵¹ Simmons, *Moral Principles and Political Obligations*, p. 84.

to speak up if they are opposed count, according to Simmons, as a quiet consent to the Chairman's proposal. Here consent is:

“... tacit not because it has a different sort of significance than express consent, or because it, e.g. binds less completely.... Consent is called tacit when it is given by remaining silent and inactive; it is not express, explicit, directly and distinctly by action, but rather is expressed by the failure to do certain things”.⁵²

Importantly, this example sets conditions for silence to count as consent: (1) potential consenters must be aware that they are in a situation in which both consenting/non-consenting are possible; (2) a specific period of time during which people can consent or dissent must be predetermined; (3) potential consenters must know that after the set period of time expires they will not be able to express their approval or objection;⁵³ (4) potential consenters must be allowed to express their dissent in reasonable and easy ways; and finally (5) the costs of dissent must not be forbidding or harmful to the individual. These conditions collectively establish a clear-choice situation, they include silence in the known category of acts that in the appropriate circumstances will be taken as signs of consent, and they guarantee genuine voluntariness by preventing the choice of dissent from becoming so dangerous, strenuous or costly that no one would be inclined to opt for it.⁵⁴ Tacit consent given within these parameters would then undoubtedly engender an obligation. This interpretation has the same fundamental flaw as express consent, however – it takes us no closer to justifying the political obligations of actual citizens. Political life never places individuals in situations that are equivalent to the board-meeting example (~~C7conformity~~). This negates all aspirations to generality (~~C1generality~~) as there are bound to be no citizens whose silence or inaction, at the right moment, has legitimately been the kind of tacit consent that meets the four prerequisites. Tacit consent as meaningful silence is therefore not the kind of argument that can realistically sustain the genuine political obligations of citizen masses and consequently cannot be found to justify the political obligations of actual citizens because it is just as recurrent in nature as express consent.

⁵² *Ibid.*, pp. 79-80.

⁵³ *Ibid.*, p. 81.

⁵⁴ Call this the sufficient freedom condition; it should be held to apply to all accounts that appeal to supposedly voluntarily made choices that do not involve clear expression.

Though many have embraced Simmons' interpretation of tacit consent (Raz, Edmundson, Carr, Horton, Klosko, Knowles all think that his reading is probably very similar to what Locke had in mind) the view is not canonical; there are some that hold that the sorts of acts Locke mentions can, in fact, amount to authentic consent. These authors have proven to be neither as willing to insert as considerable moral baggage into the theory, nor as committed to voluntarism as Simmons is. Simmons set the standards for political obligation as being the result of a freely delivered tacit consent higher than anyone, including Locke; to his mind the obligation to obey [justified through consent] belongs only to those who have willed it under full conditions of knowledge in clear, non-coercive, non-damaging situations. Other voluntarists are nevertheless ready to lower the bar of consent. They subsequently argue that tacit consent can be *assumed to have been given* when citizens cannot appeal to excusable ignorance about the supposed significance of continued political membership past the age of legal majority, or when they perform acts associated to the role of citizen itself. These practices of stretching intent to fit routine features of [democratic] life will not prove, on further analysis, to have the expected pay offs, however.

- ***Tacit Consent as Residence (TCR)***

Joseph Tussman was among the first to defend the idea that residence is a form of tacitly consenting to the authority of the state.⁵⁵ Against Hume's original claim that "lodging" cannot be a genuine sign of consent because its alternative, leaving, is prohibitively costly, Tussman argues that if governments were capable of creating awareness that the choice to stay within the borders of one's state of birth signified tacit consent then, regardless of how taxing the alternative of leaving would be, residence would produce a moral duty to obey the law. Tussman discounts the idea that the "unpleasantness" of the choice detracts from voluntarism. For him:

"...to say that consenting to the status of a member is involuntary because the alternative is not as pleasant or convenient [as staying] is to confuse convenience with

⁵⁵ J. Tussman, *Obligation and the Body Politic*, Oxford University Press, Oxford, 1960. Before him Plato used residence as a means to justify obligation in *Crito*, and so did W.D. Ross, in *The Right and The Good*, when he wrote that residence "is an implicit promise to obey", Oxford University Press, Oxford, 1930, p. 27.

necessity... [This unpleasantness] does not rob a deliberate choice of its voluntary character”.⁵⁶

Tussman’s opinion on the effects of *unpleasantness* on consent has encountered much resistance in the literature, the standard objection being still profoundly Humean: tacit consent in the guise of residence violates the conditions set for what counts as a correct instantiation of it because citizens are unaware that staying in the country of birth past a point means consent, and immigration is obviously not in the category of reasonably easy alternatives.

Even with distance from classic Lockean consent, or when viewing the fourth and fifth conditions [for tacit consent] as the excessive demands of orthodox voluntarists, there are still ample reasons to consider the proposition that “unpleasantness is inconsequential to voluntarism” unconvincing. *Prima facie* it can be agreed that impediments, no matter how extraordinary, are not always necessarily unsurpassable or toxic to real choice situations. In theory, the reality that emigration is unpleasant establishes no more and no less than that it is an uneasy, challenging and costly option; it excludes leaving neither from the realm of possibility nor from the category of genuine alternatives. Nevertheless, as human beings operate on practical levels, the proponents of tacit consent as residence must acknowledge that its exorbitant price makes it the sort of choice few individuals could bring themselves to will. Put simply, citizens can theoretically will to emigrate and do it. But would they actually ever be inclined to take into consideration and act on such a decision? Arguably not, or at least not but in the most exceptional of cases. Tussman ignores the fact that, in the real world, costliness and difficultness effectively eliminate emigration as an alternative to obedient residence everywhere but on paper (and thus falls foul of *C7conformity*), with citizens far more likely to opt for staying out of fears of exclusion, isolation, deprivation, loss or poverty, than because they experience some authentic desire to submit to the rules of the government. This should be taken as a first reason to doubt that tacit consent as residence amounts to actual consent.

Although Tussman’s account was not successful he was not the last to employ tacit consent as residence as an instrument of justification. Harry Beran and Michael Walzer have both famously articulated this sort of theory of obligation, writing on the

⁵⁶ Simmons, *Moral Principles and Political Obligations*, p. 98.

issue with the intention to eliminate the uncertainty that residence is a genuine, non-extorted promise that produces obligations.⁵⁷ Of the two, Beran makes the better case. In a series of texts he sets out to defend the hypothesis that the choice to continue residence past the age of majority *is* a form of obligation – generating tacit consent not affected by the probability that individuals are by and large unaware that, from that age onwards, their residence will constitute an agreement to be bound.

His first contention in favour of this thesis is that, even in the absence of this knowledge, people still *understand* that remaining within the confines of their birth countries is the equivalent of an *acceptance* of “full membership” that entails, among others, obedience to law.⁵⁸ Beran’s logic is that if people comprehend that membership in a community presupposes abiding by its rules, then they are in practice consenting to compliance. Beran attempts to reinforce this contention by explaining that even if people were to fail to fathom this, they would still be obligated to obey because, in that case, their ignorance would be negligent, rather than excusable.⁵⁹ Finally, to address the fears of those concerned that residence may not be a bona fide choice, Beran argues that moral opinion does not prevent seeing “forced by the circumstances” consent through residence as capable of producing an obligation; the hard choice – between continuing to reside and obeying the law and emigration – is not an *unfree* one and it can produce obligation even if the promisee would rather not make it.⁶⁰

There are multiple issues with this argument. To begin with, when performing justifications, statements that people “understand” and “accept” ought to be taken with a grain of salt: generally there is little substantial evidence to back them up, and it unwise to use uncorroborated and potentially wide-of-the-mark assumptions as

⁵⁷ M. Walzer, *Obligations: Essays on Disobedience, War and Citizenship*, Oxford University Press, London, 1970, pp. 103-112.

⁵⁸ Excusable ignorance is the sort of ignorance that results from a lack of experience, from being deprived of information, from youth, from alienation. It is opposed to ignorance that results from negligence, i.e. wilfully opting to remain unaware, not taking into account certain bits of information, etc. A. J. Simmons, “Consent, Free Choice and Democratic Government”, *Georgia Law Review*, No.18, 1983-1984, pp. 791-819, p. 806. Beran keeps this in mind when he writes his argument. H. Beran, “What is the Basis of Political Authority?”, *The Monist*, Vol. 66, No. 4, 1983, pp. 487-499. pp. 494-495.

⁵⁹ It is so because people “should consider what moral significance there is in their new status and their new rights”. H. Beran, “In Defense of the Consent Theory of Political Obligation and Authority”, *Ethics*, Vol. 87, No.3, 1977, pp. 260-271, p. 270.

⁶⁰ H. Beran, *The Consent Theory of Political Obligation*, Croom Helm, London, 1987, p. 105; also see Beran, “What is the Basis of Political Authority?”, pp. 497-498.

sources for normative consequences of the weight and magnitude of political obligation. In this case it is particularly unwise to go down this route, since whatever “understandings” and “acceptances” people may have vis-à-vis membership – as a general category of belonging – are likely to be sourced in practical experiences within groups that have very little in common with the state. In the real world, individuals belong to two types of groups, voluntary ones, in which entry is fully consensual and predicated on the explicit (or tacit but in a context that perfectly replicates Simmons’ board example) acceptance of status and rules, or non-voluntary ones in which entry is accidental but which are typically held together by emotional or biological ties and informed and permeated by attachments, convictions, moral duties, interpersonal connectivity and the likes. Membership in either of these is, for obvious reasons dissimilar to citizenship in the large, heterogeneous, impersonal, unfeeling body politic. As such it is unlikely that people will draw mental parallels between the groups they recognize and perceive themselves as belonging to, and the state, and arrive at similar understandings and acceptances concerning the latter.

Another aspect to cause immediate misgivings is his claim about occurred understandings. Simmons thinks that if the understandings Beran has in mind actually happened we would see some outward sign of them.⁶¹ This is not a very strong charge but still stronger than a potential rebuttal. It could be argued that there are events in one’s political life – the issuing of ID, the legal coming of age, etc. – that do coincide with some change in social behaviour (at least in the latter case, as full legal responsibility begins), and that could hence be said to be joined at the hip with some novel awareness. Sociologically speaking, this is a defensible counterclaim, especially when considering that those occurrences separate the lives of individuals into “before” and “after”. It would however be difficult to incontestably demonstrate these understandings regard residence as a method of conveying consent to subjection, or immigration as the alternative to it. Merely becoming mindful of one’s assigned full rights and duties is much more probable. And equating potential realizations of acquired full citizenship to an acceptance of political obligation would not be that much different from equating admitting to your sickness to consent to be ill, or observing yourself burnt to a crisp to consent to be struck by lightning. Internalizations of *status quos*, even those accompanied by outward pronunciations of

⁶¹ “only the rare individual thinks that there is anything to join at his majority”. Simmons, “Consent, Free Choice and Democratic Government”, p. 809.

occurred recognitions, simply do not amount to consent. Observing yourself to be “x” is not consent to be “x”, nor does it obviously (a) imply an insight that you have done something, however passively and non-intentionally, to bring this about, (b) produce a duty or a *belief* that there is a duty to behave in a certain way, (c) coincide with resignation and “acceptance” of the state of things or (d) otherwise trigger other meaningful *light-bulb* moments. If there is an argument for political obligation in the vein of what Beran has in mind (and there is) it is not one that can genuinely claim itself to be consensual. The fact of the matter is that, in the picture Beran paints, both consent and acceptance are bastardized concepts, the latter beyond all recognition, the former almost. As such, although Simmons’ complaint is not in itself strong, his (and everyone else’s) underlying opinion verifies that there is simply no proof of *understanding* obligation to be a consequence of membership tacitly consented to by a failure to depart, let alone of low-key, barely mindful acceptance. Beran’s argument therefore entertains a dubitable connection to the mental realities of citizens, and thus misses the mark for ~~€7~~conformity.

A still more potent objection to Beran’s account is the one that draws on his peculiarly Hobbesian view on choices. Elaborating on views he first expressed when criticising Tussman’s account, Simmons takes issue with Beran’s readiness to discover authentic choice situations in scenarios arguably victimizing of individuals. He writes that, although not all difficult-to-make decisions are necessarily extorted, moral theory disallows unconscionable agreements, or agreements obtained through manipulation or in exchange for necessary goods, to produce a right against the consenter; to his mind obligation cannot flow from the exploitation of persons found in a position of vulnerability.⁶² Simmons is not alone in this last suspicion. In “Reformist Consent and Political Obligation” George Klosko formulates an identical critique based on what he calls “the independence condition” of tacit consent as residence. To understand what he means we need to go back to Beran’s original attempt to show that taxing choices are not always coerced ones. To prove his point about hard choices Beran constructs the examples of “Green” who has to submit to hospital rules in order to receive medical treatment and of “Brown”, an innocent person who is accused a murder and needs to contract a lawyer. Beran’s point is that, even though they would much rather not conform to hospital policies or contract legal

⁶² Simmons, “Consent, Free Choice and Democratic Government”, p. 811, pp. 813-815.

representation, the choice to abide by hospital rules and to pay for counsel are not coerced: they are unpleasant, they are costly, but they are freely made (by individuals whose universes of choice remain wide) and thus “sufficiently voluntary”.⁶³ Although Klosko does not take issue with these claims, he nevertheless denies that the choice faced by those forced to opt between staying (and obeying the law) and leaving is identical to the choices that had to be made by Green and Brown.

The key difference between these cases is the fact that, while in the examples provided by Beran, the tribulations faced are in no way caused by those to whom a promise will be due, in the paradigm of the state the problem (having to opt between remaining in the country or emigrating) is actually generated by the very state to whom a promise to obey would be owed should the option to stay be selected. The state and the presented choice are therefore not independent of each other but linked through cause and effect. Less confusingly, the state disrupts the lives of individuals by presenting them with a mandatory hard decision with the easier way to end the disruption being succumbing to its will and submitting to its rules. What Klosko aims to convey is that, within the logic of this argument, the state is both the one to “wound” and the one to “save”. He thinks this serves to detract from the authenticity of the choice: when it comes to opting between binding oneself or “something difficult”, the choice is a free one only if the “choicee” is not forced into making a decision by the person/persons to whom they will become bound if they pick one of the alternatives.⁶⁴

This objection is the most powerful criticism. A Hobbesian may attempt to take them on by counter-arguing that contract and consent were designed to be made in the ultimate difficult situation – the state of nature – and that, if consent was able to produce an obligation then, it should be able to degenerate a duty to obey in the scenario proposed by Beran. That however would be a straw-man argument. In that scenario, obedience and surrender were hard but rescuing alternatives to suffering and disorder; in this one they are options in a shoved-down-the-throat choice between them and the “evil” of emigration. The contexts are not comparable – in one obligation is the one condition attached to rescue, in the other it is one of two hardships between which an unsuspecting individual suddenly has to choose. And it

⁶³ Beran, *The Consent Theory of Political Obligation*, p. 105.

⁶⁴G. Klosko, “Reformist Consent and Political Obligation”, *Political Studies*, 1991, Vol. 39, pp. 676-690, pp. 680-681.

would be mistaken to believe a counterargument in this vein would fare better on a more positive Lockean/Rousseauian view on the state of nature: duress and hardship in those more positive contexts were not imposed by or created by the party to whom consent was to be given, *pace* Klosko. The consented-to remained in a default position of moral neutrality vis-à-vis the consenting agents.⁶⁵ Conversely, Beran's state forces the individual into electing between severely unbalanced options and stands to benefit if he or she opts to surrender and obey. Thus, while it cannot be denied that not all hard choices are obligatorily coerced, the consent-or-leave choice imposed by TCR is unconscionable and cannot create, as moral theory informs us, political obligations.⁶⁶ In these circumstances I find with Simmons and Klosko that Beran's choice situation is sufficiently un-free to negate consent.

To these protestations, one other needs to be added concerning Beran's claims from acceptance. In the language of political obligations, "acceptance" is a strong term that should not be used without carefully determining if the conditions for it verify. As will be seen when discussing the Rawlsian account on the principle of fairness, a person can be said to have accepted something only in the aftermath of a meticulous, well thought-out personal process of evaluation that has generated certain states of mind and a firm, fully conscious decision to do so. In the theory of obligation, acceptance is much more akin to actual consent than to passive acquiescence – the most realistic description of citizen responses to authority. Nothing in Beran's argument, or reality, suggests that is what happens when people allegedly consent through residence. So, even if citizens had the realizations about membership he has in mind, there would still be as little space to spot acceptance as there would be to discover express consent (C1generality). The argument from acceptance is therefore not only probably factually inaccurate but also brings us no closer to justifying the requirement to obey. In the best case scenario his acceptance is no more than a false synonym for *going along*; and while going along may create expectations it does not, in and of itself, produce duty or otherwise render the state justifiably entitled to expecting compliance (CO6non-confusion).

⁶⁵ B. Boxill, "On Some Criticisms of Consent Theory", *Journal of Social Philosophy*, Vol. 24, No.1, 1993, pp. 81-102, pp. 85-88.

⁶⁶ For more on consent vs. hard choices see J. Murphy, "Consent, Coercion and Hard Choices", *Virginia Law Review*, Vol. 67, No.1, 1981, pp. 79-95, p. 88 and R. Higgins, *The Moral Limits of Law*, Oxford University Press, Oxford, p. 107.

To conclude, much like Tussman's justification, Beran's argument allows knowledge, deliberation and will to play neither the meaningful part their predecessors awarded them, nor one substantial enough to allow the identification of consent. TCR hence cannot justify political obligation because of structural issues that are profound enough to raise serious doubts about whether the argument authentically belongs in the voluntary category and about the moral permissibility of the choice situations employed. Beran's bottom line fault is attempting to root obligation in a will that is not there and which cannot be shown to have had to be there (insofar as Beran expects too much of citizens and inserts too much moral force into the act of staying). If membership is to establish a special connection then it will be on some associative argument, not one arising from presupposed consent. This interpretation of the tacit consent paradigm is therefore flawed and unsuccessful. In the next section, I show that the same conclusion can be reached about tacit consent as voting.

- ***Tacit Consent as Voting***

The faults of the argument from residence prompted a second class of modern proponents of tacit consent to pursue the alternative avenue of voting. These scholars think that, should they manage to convince that the present equivalent of tacit consent is voting, they will be able to justify a duty to uphold the law without encountering any of the obstacles faced by previous consensual accounts. John Plamenatz, Alan Gewirth and Peter Steinberger have reached this sort of conclusion.

For example Plamenatz, an important consent theory scholar, writes in the preface to the second edition of his classic tome:⁶⁷

“If Smith were in fact elected, it would be odd to say of anyone who had voted for him that he did not consent to his holding office Where there is an established process of election to an office, then, provided the election is free, anyone who takes part in the process consents to the authority of whoever is elected to the office.”⁶⁸

⁶⁷ This opinion is at odds with Plamenatz's original argument in the *First Edition* that consent must always be voluntary, intentional and aware.

⁶⁸ J. Plamenatz, *Consent, Freedom and Political Obligation: Second Edition*, Oxford University Press, Oxford, 1968.p.168 and J. Plamenatz, *Man and Society*, Longman's, London, 1963, pp. 239-240.

Three main arguments against tacit consent as voting can be put forward: citizens cannot vote on laws or constitutional provisions, since this is the prerogative only of elected majorities;⁶⁹ voting is merely a way to express preference for a person or party from a list of given options (which is the standard indictment against this form of consent); officials' portraying of voting as both a right and as a duty of citizenship indicates "that the status and duties of citizenship have some entirely different basis than the consent given in voting".⁷⁰ Of the three the second and third charges have most force, the first being a commonsensical observation that requires no further clarifications. The third contention, introduced by Simmons, is a fundamental question of causation: have we a) voted and therefore have conveyed our consent to political obligations and have thus become citizens or are we b) citizens and therefore settled with a privilege-duty to vote that reflects our alleged special status and relationship with *our* state? Proponents of the argument think the first, all others think the latter. Logic and evidence, however, suggest the consensus of political thought to be the one in the right here. By way of analogy, if their logic was fair, then the Prince of Wales is royalty because he has accepted institutional patronages and has so consented to royal status. Since clearly the inverse relationship of causation is the one that verifies, *ceteris paribus*, we have the prerogative to vote and vote because we are assumed to be citizens, as opposed to being citizens because we have voted. Citizenship logically and procedurally precedes voting, with voting being predicated on it, as do all responsibilities or perks associated to a held role. If the opposite were true then crippling questions about inclusions (in voting pools) and the moral permissibility of exclusions and districting would arise and bring about a host of other issues.

There is sufficient weight in the standard indictment to make all others superfluous, however. In actual democratic circumstances voting is not consent to becoming obligated. The two are intrinsically different: consent is an agreement to X where X is to submit and to obey the law; voting on the other hand is a choice between alternatives P, Q, R and S as the agents in charge of exercising authority. This difference between the two is not subtle. Suppose that an individual is presented in elections with a choice between Labour, Conservative and Liberal Democratic candidates. Suppose, at first, that she goes out to vote and her preferred Labour

⁶⁹ Simmons, "Consent, Free Choice and Democratic Government", p. 799.

⁷⁰ *Ibid.*, pp. 800-801.

candidate wins the constituency. Can this be said to be identical in meaning to her having consented to renounce as much of her natural freedom and autonomy as is necessary for social order, the protection of lives, liberties and possessions, etc.? Not at all. Her thinking that Labour policies are on balance more conducive to the achievement of her and her fellow citizens' goals is not the same as a personal agreement to renounce her natural freedom and be ruled by a legitimate political authority that so happens to be divided between Parliament, the executive branch, and the hereditary head of state; at best, this can be interpreted as her having given permission to a certain candidate to exercise a political authority that is still to be shown to be correlative to obligation. Suppose now that the Labour candidate is defeated. Surely her being represented by an MP elected by a majority of which she was not a part does not amount to consent; quite the contrary, she herself has *not* consented to submission or authority being exercised by that person, a fact made clear by her desire to send someone else to the Commons. In this situation not only has she not been proven to have political obligations towards the state, she is also dissatisfied with the way political arrangements have turned out. No agreement can be discovered at all. In the first case she could perhaps be said to have by and large assented to some officials (from the provided list of options) being in government, physically, to being in authority on the assumption that someone has to have authority; whereas in the second one she can decisively be said to have consented to absolutely nothing. Suppose, lastly, that our young person does not dispose of her constitutional right to vote and stays home on election day. Defenders of tacit consent as voting could be tempted to claim that her political inactivity is her way of silently consenting to the authority of whomever the majority elects. Far from it: if "silence" is not a conventional response to a clear choice situation in which participants are aware that it constitutes agreement it cannot be counted as consent to anything. A permission to rule over her is yet to be granted, her inactivity only excluding her from the selection of the still unjustified authority positions. Because of this we can be sure that, whatever the results of the electoral process, her silence has no higher significance than perhaps acquiescence to go along with the results. Voting, therefore, does not create *de jure* authority- it just divides *de facto* one; ~~COIA sufficient normative strength~~ therefore fails to be observed.

These criticisms against Plamenatz's tacit consent as voting also stand against the other two relevant proponents of the theory, Alan Gewirth and Peter Steinberger. Their arguments can be subjected to further internal criticisms, however. Gewirth's main claim is that voting is the "institutional arrangement" that lies at the foundation of government by consent, and that it serves as a justification for a *prima facie* obligation to obey the law because of all the benefits it confers to government.⁷¹ Although it would be hard to dispute that democratic governments are better than the available, tangible rest, the fact that a government is "better than..." does not serve as an explanation of the bind to obedience, ~~CO2non-foundational-justice/quality~~; thus his reasoning is incomplete, as far as the establishment of political obligation goes. Steinberger, on the other hand, thinks of voting as a way of participating in a fair democratic process that bestows certain benefits on its members.⁷² He likens it to sitting down in a poker game and playing. His logic is that, in both cases, once you've started playing nobody would think to ask you if you consent or if you have accepted the benefits that you drew from the game.⁷³ The drawbacks to his argument are that: (1) the discussion about benefits fairly derived from participation does not belong to consent theory but to the principle of fairness, a fact that automatically changes the ground of obligation from consent to receipts of benefits, and thus renders consent normatively useless and grounds political obligation in an argument that, as we shall see, cannot be said to generate political obligations, ~~(CO1Asufficient normative strength)~~ and ~~CO1Bnon-degeneration~~; (2) that his poker game example does not reflect the reality

⁷¹ A. Gewirth, "Political Justice" in R.B. Brandt (ed.), *Social Justice*, Prentice-Hall, New York, 1962, pp. 138-139.

⁷² Claims from democracy may appear to throw a bit of a wrench in the argument against voting and its ability to signify consent but they do not. As always, we must first remember what political obligation and being obligated mean: to be morally required to surrender to the will of an agent in possession of a morally justified right to circumscribe liberties and autonomies. The question asked in voting scenarios, however, is not "do you wish to renounce as much of your natural freedom as is necessary for the delivery of social order, the protection of lives, liberties and possessions, etc., etc., etc." but "who, amongst X,Y,Z, would you like to apply the restrictions on freedom and autonomy necessary for social order, etc.??". Voting therefore is not consent to subjection but assent to the administration of a presupposed right of restriction that has not been shown to exist and which remains unjustified. As far as political obligation is concerned voting is thus only a question of management of wishful thinking. The quality of this management may have some implications for authority, as established by Kantian-functionalists who argue that inclusive, majoritarian practices do award the state with de facto authority corresponding to piecemeal acts of obedience; within that logic, voting could provide some additional reasons to comply if only because it is part of a mechanism that, in theory, awards equal consideration to the opinions of all and pursues the largest common good. But no normative relationship of the kind of political obligation can be established by it: the facts that it may be the best [possible] practice, or produce superior consequence, are, as is known, irrelevant to the existence of actual obligations.

⁷³ P. J. Steinberger, "Political Obligation and Derivative Duties", *The Journal of Politics*, Vol. 64, No.2, pp. 449-465.

of our political lives – which would have been better captured if he had imagined players in the mental experiment being born at the poker table with one leg shackled to it (C7conformity). Independently of these considerations however, an analysis of their theories brings us back to the same issue, i.e. voting not being able to account for the source of the authority those who are elected will come to apply.

The proponents of TCV therefore obfuscate not only the distinction between consent and voting, but also the distinction between consent and acquiescence. The first is a clear expression of will; the second a form of expressing a preference that is no more than the exercise of a right to pick from a pre-determined list of available alternatives those agents that will come to discharge political authority, and this does not correlate to political obligation on the side of citizens. Connectedly, while the absence of consent is the absence of a duty to obey, the absence of voting, or a negative vote, has no effect on the duty to obey in contexts in which genuine moral requirements to do so exist. Furthermore, in worlds that allow political authority in the absence of political obligation, voting is in all aspects irrelevant, because whatever piecemeal obedience there is it is not contingent on expressed preferences – whatever justifies *de facto* authority is not at all affected by opinions, majoritarian or otherwise; that is what being authoritative means. The big problem with this argument, therefore, is that voting is inconsequential as far as obligation and obedience are concerned, even if it is the way to select authorities (and thus has political obligations consequent to it, *pace* Rawls), since going out to vote for the favourite candidates acts merely as a permission, a “gift” of power to a set of civil servants who get to oversee the execution of authority, and not as a way to end natural freedom and obligate ourselves to obey the authoritative commands of *the Government* independently of *who* is *in government*. Further, while voting establishes some degree of responsibility, as does any choice with blanket effects, it has no power to change the normative situation of voters; it is not a creator of moral requirements to obey; and it is a feature of the special relationship rather a source of it. In the wake of these comments, the best that can be said about voting is that it contributes to the view of democratic procedures as sanctioning some authority without political obligations, as defenders of democratic regimes better show. TCV, therefore, does not have the imagined normative consequences, their proponents failing to distinguish between sources of authority and sources of obligation, as well as failing to recognize voting not as creating citizens, but as part of the package of rights and duties corresponding

to this morally unjustified special status. Moral and theoretical reasons preclude this modern spin on tacit consent from achieving success in its justificatory endeavour.

In the aftermath of these rejections, advocates of consent-based accounts of political obligation introduced a measure of separation between substantive reality and purported instances of consenting, rendering it conjectural. In this novel direction, efforts were made not to show that consent has happened, but that in appropriate circumstances it can be thought to have happened or be argued morally impermissible not to have happened, the underlying opinion being that, in this way, criticisms arising from both inconsistencies with reality, or from the lowering of the threshold for consent, could be avoided. In the next section I show that these arguments fall short, both as voluntary accounts and as justifications of political obligations *tout court*.

Hypothetical Consent

The failures of express and tacit consent as residence and as voting to account for the obligation to obey forced political theorist to focus on a lesser known variation of the paradigm discovered by Kant. This is how hypothetical consent (HC) came to be revived in the 20th century. HC theorists uniformly sacrifice to an important extent the powerful connections that exist between the classic consent and voluntarism, knowledge and deliberation in an effort to reconcile consent to political realities. As I show, this decision has not only rendered hypothetical consent virtually indistinguishable as a manifestation of consent, but has also failed to yield successful justifications.

The first and best-known modern advocate of HC is Hannah Pitkin who, in her celebrated “Obligation and Consent I” defends this position from a Lockean perspective.⁷⁴ In this essay, Pitkin asks herself three questions: what does it mean to “tacitly consent”, to what does one consent to, and what are the practical implications of tacit consent for those that can be said to have employed it. Pitkin’s answer to these questions is a reinterpretation of the concept. For her, to consent tacitly means to “append your signature as if it were to the original document”, as a gesture of approval to “the terms of the original contract which the founders of the

⁷⁴ Lockeans tend to think of hypothetical consent as a form of tacit consent.

commonwealth made, no more no less”.⁷⁵ Because she considers this appendage of a signature to be virtually automatic in modern societies, however, the ground of obligation in her argument eventually shifts from a personal promise to obey onto a special characteristic of the authority/ government, namely the fact that “it acts within the limits of the authority rational men would, abstractly and hypothetically, have to give government”, that it is the kind of government that “deserves consent”.⁷⁶ The bulk of her argument from then on becomes that, as long as governments function according to the “trusteeship” established by the social contract (utilizing its authority over people and limiting their freedoms only as far as made necessary by the requirements of order and security), individuals give a hypothetical consent to it that is just as meaningful as express consent.

Pitkin’s description of hypothetical consent as being a type of Lockean TC has drawn criticisms from Simmons. He reads Pitkin’s text as a failed effort to reconcile (1) the fact that Locke’s words on tacit agreement create the possibility of consent to bad or immoral governments, (2) the fact that Locke previously tells us, numerous times, that we cannot obligate ourselves to tyrannous political constructions, and (3) consent as being the only grounds of obligation. Pitkin was noticeably concerned with the quality of the governments to which people could be said to have tacitly consented. Motivated by the desire to ensure that consent can only be given to proper authorities, when faced with the apparent inconsistency in Locke’s text, Pitkin chose to “sacrifice” condition three. Simmons thinks this to have been a major error. According to him, Pitkin ought to have realized that it is perfectly possible for consent to be “only a necessary, rather than a sufficient, condition for the generation of obligation”.⁷⁷ What Simmons means by this is that, in certain situations, considerations of morality interfere and prevent us from becoming obligated, even if we are inclined to give our consent. This is a standard caveat in consent theory derived from natural law – our consent binds us to anything we will, except those things that are prohibited by superior moral considerations (such as illegal acts). It is

⁷⁵H. Pitkin, “Obligation and Consent I”, *The American Political Science Review*, Vol. 59, No.4, 1965, pp. 990-999, p. 995.

⁷⁶Pitkin uses the term “government” to refer to the presupposed possessors of rights against (i.e. those owed political obligation). She places the emphasis on government because obligation is derived from a feature of government that she holds makes *de facto* authorities *de jure* ones. Pitkin may use different language than most political obligation theorists but there are no conceptual differences. See. Pitkin, “Obligation and Consent I”, p.999.

⁷⁷Simmons, *Moral Principles and Political Obligations*, p. 86.

because of this insufficiency of consent that Simmons does not feel there is any unbearable inconsistency between the three Lockean claims; people can tacitly or expressly consent to a bad government but that does not mean they will become bound to it: regardless of whether he has consented or not a “man, not having the power over his own life, cannot, by compact... enslave himself to any one, nor put himself under the absolute, arbitrary power of another...”⁷⁸. Thus, the possibility that we may come to consent to morally objectionable governments does not compel us to alter the grounds of obligation, as Pitkin has done; it only forces us to remember the creed that individuals do not have the right to dispose of their lives in whichever way they see fit. Consequently, Simmons’ criticism of Pitkin’s assertions about Locke is correct, insofar as it confirmed by both Locke and everything natural law scholars have taught us.

Of course, Pitkin’s misconstruction of Locke does not necessarily mean that hypothetical consent must fail as an independent theory of political obligation. Even when separated from Lockean thought, however, Pitkin’s hypothetical consent does not fare any better. To begin with, determining if authorities actually operate within the parameters set by the original contract, and thus deserve consent, would be an enormously daunting task. Since the social contract is a mental experiment, we have no way of knowing what its exact terms are, and therefore nothing against which we could genuinely verify accordance. Although we could perhaps intuit them the evaluative task would not be much simplified. Governmental review would still be conditioned, as Pitkin herself acknowledges in “Obligation and Consent II”, by the setting up of some procedural standards, and of a series of “substantive standards” designed to enable citizen bodies to discover if “good, benevolent, justifiable policies” are being pursued.⁷⁹ Since these standards would have to cover all realistic political scenarios, be fixed enough to allow for uniformity of practice but simultaneously change in ways that mirror modifications of relevant social circumstances, and still be accessible enough for everyday popular use, compiling such a list would most likely be beyond the intellectual capabilities of any one or collection of individuals. Moreover, even if these standards could be put forward, we have little reason to believe that citizens would have the time, patience and capability

⁷⁸ Locke, *Two Treatises of Government*, p. 284.

⁷⁹H. Pitkin, “Obligation and Consent II”, in *The American Political Science Review*, Vol. 60, 1966, pp. 39-52, p. 43.

to review all political decisions and all available alternatives according to them. It would require levels of political participation and awareness superior even to those assumed by direct democracies (C7conformity). These two facts alone are enough to show that “consent worthiness” is not something that could be established, at least without tremendous efforts. Coupled to this, however, is another issue,; the fact that, independently of whether or not people would be capable of making the necessary appraisals of governmental quality, Pitkin should have provided an explanation as to why the statement that “*we ought* to obey a government that deserves consent” is synonymous with “*we must* obey a government that deserves consent”; an impossibility, considering that theoreticians of obligations have time and time again underlined the distinction between the language of “have to” (the language of moral requirements and obligations) and the language of “ought to” (which belongs to the realm of moral reasons and non-compulsory duties). In these conditions, there is space to argue that Pitkin’s argument is not that much different from a Kantian thesis of authority deriving piecemeal obedience as a consequence of well-performed state functions; but there is not enough force in her argument to close the gap between legal obligation and moral obligation (CO2non-foundational justice/quality). Pitkin eventually sees all these herself and in her second article on obligation and consent, in which she acknowledges the faults of her argument, rebuffs the idea of tying obligation to an indeterminate “ought”, recognizes the forbidding complexity of evaluation and even questions the rationale behind resting political obligation on consent genetically tied to an artificial institution of promising.⁸⁰ In these ways, she effectively disowns her own theory.

For decades Pitkin’s hypothetical consent remained the only such theory of obligation.⁸¹ Ronald Dworkin played an important part in that when he wrote “...hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual

⁸⁰ Pitkin, “Obligation and Consent II”, pp. 45-48.

⁸¹ Only Jonathan Wolff stood out with an interesting position in this interlude. He thinks we could attempt to marry hypothetical consent with another justification in what he calls a “two-stage justification of the state”. He does not know, however, what this alternative justification could be. See J. Wolff, “What is the Problem of Political Obligation”, *Proceedings of the Aristotelian Society*, New Series, Vol. 91, 1990-1991, pp. 153-169.

contract; it is no contract at all....”⁸² In recent years however two attempts have been made to resurrect hypothetical consent as a stand-alone argument, by Mark Murphy and David Estlund.⁸³ Murphy’s account of political obligation revolves around the idea that citizens hypothetically consent to the authority of the state by surrendering their rights to form judgements about the principle of justice. He employs a “notion of consent in which one consents to another if one accepts the other’s determinations of general principles as his or her own”. These determinations belong to political institutions that make them for “the purpose of practical reasonings”, i.e. long term goals that require public cooperation such as establishing the just order.⁸⁴ Murphy’s argument from then on narrows down to the hypothesis that what people consent to is actually a cooperative scheme whose primary aim is discovering principles of justice that govern the just order that people can recognize as their own (his intuition being that we have to abide by principles that we perceive as applying to us).

Murphy’s proposed justification of political obligation allows and encourages a two-level reading: one at face value, and one – truer in many senses – interpretative. At first glance, Murphy’s argument appears to attempt to reconcile statements specific to voluntarisms with elements of natural duty logic. First, there is a very weak (if that) element of consent. This consent is not “attitudinal” or “occurent” and has no role, normative or otherwise, other than being assumed to have been surrendered.⁸⁵ It is not backed up by will, by intention or by deliberation, it is not an event, in any senses of the word, and it is not a belief or a specific behavioural pattern either. In fact, it is unclear what his consent amounts to; according to the criteria set by past consent theories, it is unrecognizable as such. Secondly, there is a “principle of fairness” component that never quite makes it to a fully-fledged argument from benefits in the vein of what fairness proponents marshal. Murphy borrows the idea of a cooperative scheme from fair-play accounts and marries it with his earlier straightforward appeal to consent; an unorthodox choice, considering that claims from fairness were designed as means to avoid the latter’s issues and are theoretically sufficient grounds

⁸²R. Dworkin, “On the Original Position”, in Norman Daniels (ed.), *Reading Rawls*, Basic, New York, 1975, pp. 16-52, pp. 17-18.

⁸³ Also see, A. Kuflik, “Hypothetical Consent”, F. Miller, A. Wertheimer, *The Ethics of Consent: Theory and Practice*, Oxford University Press, Oxford, 2009.

⁸⁴ M. C. Murphy, “Surrender of Judgment and the Consent Theory of Political Authority”, *Law and Philosophy*, Vol. 16, No.2, 1997, pp. 115-143, pp. 131-132.

⁸⁵ W. Edmundson, “State of the Art: The Duty to Obey the Law”, *Legal Theory*, Vol.10, 2004, pp. 215-259, p. 241.

of obligation. Together, they amount to ground muddling overkill, any one of them, if vindicated, being able to on its own to generate perpetual political obligation. Still, Murphy adds. Besides elements of consent theory and of principle of fairness accounts, Murphy also inserts parts of Rawls' natural duty of justice account and quasi-Scanlonian contractualism into his argument. In doing this he sets aside two known facts, (1) that Rawls was a non-voluntarist and (2) that Scanlon's contractualism is quite different from Rawls', thus reinforcing previous observations that he tries to reconcile statements that were not designed to go together: an argument cannot simultaneously be voluntary and non-voluntary, an account of classic political obligation and a natural duty justification, Rawlsian and Lockean, unless it is a multi-principle account. Murphy, however, gives no indication that that is what he desires, or any sense of districting citizens into groups according to their applicable source of political obligation; and his one ground of obedience is always nominally consent (although in practice it has almost no normative power). Murphy, therefore, falls foul of ~~CO1A~~ ^{sufficient normative strength}—because of a practice of supplementation that obviates both the failures of enumerated grounds, their incompatibility and implicit degeneration (~~CO1B~~ ^{non-degeneration}).

Even if we overlooked all these, Murphy's apparent decision to fuse arguments from justice with elements of fair-play and consent, is still puzzling. Murphy chooses a winding route and risks exposure by arguing from toothless, essentially meaningless, consent and fairness, instead of opting for the more forthright route of natural duty that is obviously more in tune with what he has in mind. The persistent question of why not argue directly from justice informs his account at all times. After all, stripped of hypothetical consent, Murphy's argument boils down to a claim that there is a cooperative scheme – at this point a fancy phrase for a state – that provides us with principles of justice that we recognize as our own and under whose domain we are better off.

While Murphy's account seems Rawlsian, however, it could also be argued that it is actually very Razian, the idea that “something” imposes obedience on people because they are better off under it being at the core of the normal justification thesis. Then Murphy could be said to replace, behind all artifice, Razian reasons with the principle of justice. This still would not be progress. In fact, it is doubly problematic, firstly because it entrusts the production of principles of justice to run-of-the mill institutions and secondly because Raz's normal justification thesis (NJT) was not a

defence of generalized political obligation but a defence of the right to obedience held by *de facto* authorities. As a point of theory, given that Murphy's construction is devoid of a mental experiment, and those agreeing on the principles of justice are in a context morally and normatively inferior to those behind the veil of ignorance, there is room to argue that his institutions will be less successful in determination of principles than deciders in the original position; there is even room to accuse Murphy of a dubious logic in which people are just because they live according to principles dictated by institutions instead of institutions being just because they operate according to principles set by people in circumstances adequate for this sort of determination. Although troubling, this is not fully toxic, however: misgivings aside, it is possible for institutions to deliver generally acceptable principles to which all reasonable people could agree. What is genuinely awkward, however, is the aforementioned fact that Raz did not hold the NJT to be an argument for political obligation. *Ceteris paribus*, any theory that mirrors it, cannot and will not explain away the moral requirement to obey unless associated with something else that will fill the gap between piecemeal duty and generalized, homogenous, obligation. As such, in the absence of powerful consent or of an argument from fairness that can sustain the normative burden, Murphy's account ultimately takes us no further than Raz's thesis. Indeed, if there are any suspicions that the parts of the discourse on justice he adopts are of help they are false. The fact that the state is just does not create a duty to obey on the side of citizens, as CO2non-foundational-justice/quality instructs. And if we take Murphy to want at least part of the normative burden to be supported by a claim from a duty of justice, aside from the already present doubts about the actual ground and the implicit fears of degeneration, he still would not move forwards towards the vindication of political obligation because, as is typical of natural duty accounts, he would not be able to establish the content of that duty to be particularized obedience.

To sum up on Murphy, no matter how literal or how generous we are in interpreting his writing, his construction is plagued by faults: his hypothetical consent is not consent or vaguely consensual, his claim from fairness is effectively futile, and his round-about appeals to justice and its principles do not have the consequence of obligation; he fails to negotiate the obstacle course that is proposing a ground with CO1Asufficient-normative-strength while not forgetting about CO2non-foundational-justice/quality and avoiding CO1Bnon-degeneration. And there is of course the fact that

behind the veil of consent, behind the screen of Kantian-functionalism sits a restatement of Raz's old argument that is no account of obligation at all.

Conversely, David Estlund's hypothetical consent theory is quite compelling.⁸⁶ Estlund's explanation for the obligation to obey is part of a larger effort to justify democracy that he has dubbed "epistemic proceduralism".⁸⁷ In *Democratic Authority* he attempts to show that democratic regimes enjoy both political legitimacy and political authority. Although he could produce a stand-alone account of political legitimacy (which, in simple terms, boils down to the claim that democratic decisions are legitimate because they stem from democratic procedures that are most likely to produce correct, acceptable results), in order to establish political authority corresponding to political obligation Estlund required a justificatory theory. That is how he came to his normative consent account.

His account is built around an asymmetry he notices in classic consent theory. Recalling that the consent paradigm holds that sometimes willingly and intentionally given consent can be nullified and thus fail to produce an obligation⁸⁸ (when consent is given to something prohibited by superior moral considerations), Estlund produces the parallel contention that, in certain conditions, non-consent can be nullified too: "why not say, instead, that just as consent is sometimes null if it fails to meet certain standards, likewise non-consent can be defective too."⁸⁹ Based on this asymmetry he then argues, through examples, that in the circumstances of politics withholding consent is a morally wrongful and a null act that cannot keep us from having to discharge our political obligations.⁹⁰ For Estlund this means that consent to the authority of the state is normative consent (NC).

⁸⁶ Estlund classifies his work as hypothetical consent and we will discuss it as such even though there are scholars who claim that Estlund is actually proposing a natural duty account. Estlund denies that, however, because he sees natural duty accounts as "separate authority from issues of consent completely". D. Estlund, *Democratic Authority*, Princeton University Press, Princeton, p. 116. His opponents are, as we shall see, right.

⁸⁷ See D. Enoch, "On Estlund's Democratic Authority", *The Jerusalem Philosophical Quarterly*, Vol. 58, 2009, pp. 35-48.

⁸⁸ "...without consent there is no authority (the libertarian clause), but unless there are certain nullifying conditions (the nullity proviso) consent to authority establishes authority (the authority clause)". Estlund, *Democratic Authority*, p. 119.

⁸⁹ D. Estlund, "Political Authority and The Tyranny of Non-Consent", *Philosophical Issues*, Vol. 15, *Normativity*, 2005, 358-367, p. 357.

⁹⁰ G. Sreenivasan, "Oh, but you should have": Estlund on Normative Consent", *The Jerusalem Philosophical Quarterly*, Vol. 58, 2009, pp. 62-72 has a good discussion on this.

That consent is normative in the senses that it has normative power is obvious: all proponents of this theory believe that consent changes the normative situation of an individual, that there is a gap between moral reasons and moral requirements that it can perfectly fill.⁹¹ Because of its feeble connection to individual will and unprecedented and perilous reliance on moral reasons, Estlund's consent, however, proves not to have the normative power of its predecessors. As I show next, very little is actually normative about "normative consent".

Estlund's discussion on asymmetry is supposed to make the reader understand that on occasion moral reasons can nullify both consent and non-consent. The propositions he defends are that "consent produces a moral obligation in all but those situations in which it is nullified by superior moral considerations" whereas "non-consent does not produce a moral obligation in all but those situations in which it is nullified by superior moral considerations". There is nothing inherently objectionable about these statements, insofar as they are perfectly compatible with what we already knew from the earlier consent tradition and moral theory. Nevertheless, Estlund believes these statements to underline the equal and correlative normative power of consent and non-consent. This belief is false. On the positive side of the coin, i.e. the situations in which the agent's consent produces an obligation, it is perfectly clear that consent carries the normative load – **it** is the source of the moral requirement to X. In cases of nullification however, the normative load lies with the moral reasons that generated the nullification, not with the consent or non-consent. In other words, independently of whether that nullification has produced an obligation or not, consent/non-consent have not played any "morally productive" roles:⁹² in each case the agent's will is simply trumped by overarching moral reasons that negate it. Thus, when it comes to nullification, from a moral standpoint, consent has generated nothing; moral reasons have. This is crucial, as it has determinant negative effects on obligation.

It is important to understand that the outcomes of nullification of consent vary in one very significant way from the outcomes of nullified non-consent. When consent is nullified the agent is returned to a position of moral neutrality – no moral

⁹¹ W. Edmundson, "Consent and Its Cousins", *Ethics*, Vol. 121, No.2, 2011, pp. 335-353, p. 336.

⁹² Phrase used by T. Christiano, "Authority", *The Stanford Encyclopedia of Philosophy*. Edmundson expressed a similar opinion; he too doubted that in Estlund's theory consent has any normative or explanatory role that is not already fulfilled by moral reasons. Edmundson, "Consent and Its Cousins", p. 347.

obligation that was not there before is now present. In that context, the only power moral reasons have is to stop the appearance of a novel obligation. In contrast, when non-consent is nullified, according to Estlund's writings the person is yanked out of neutrality and burdened with a new obligation (to obey, no less). Moral reasons – understood as the moral principles that apply to the situation – therefore not only have the power to annul the will, they also have the ability independently to produce an obligation. But this is not something moral or legal theory accept: moral principles have pre-emptive power and regulative abilities but, on their own, they cannot settle individuals with obligations; create natural duties they have in virtue of their own humanity, yes, *prima facie* obligations, no. If they could and did, this would actually pose the greatest challenge to his account. If moral reasons have this capacity to not only override the agent's wishes but also independently create obligation, why appeal to consent in the first place?⁹³ What gap is there still that needs consent in order to be filled?⁹⁴ Estlund thus either denies the existence of separation between pre-emptive character and peremptory character or he is awkwardly restating the NJT as the ability of secondary reasons for nullification to annul the primary ones for non-consent. The consequence of this would not be authority, however, as was the case with NJT, but a mere return to the default position of neutrality, since, as seen, the power to prevent the desires of agents from materializing does not correspond to a power to settle them

⁹³ Couple this with Estlund's admission that authority can have sources other than consent (when consent is absent it does not necessarily mean that there is no political authority; it only means that there is no political authority stemming from that consent). Estlund, "Political Authority and The Tyranny of Non-Consent", p 354.

⁹⁴ Moral principles generate moral requirements but these requirements are not obligations. Remember the list of conditions for the latter established in the introduction. First of all, requirements imposed by moral principles have to do with the internal ethics of the moral agent and speak about their character. Obligations, on the other hand, are either voluntarily assumed or are brought about by circumstances that have nothing to do with, and are not impacted in any way by the moral fibre of the bearers. Secondly, these requirements apply at least to all those that embrace the generating moral principles. This goes against the condition that obligations be a special relationship and is seriously problematic for political obligation specifically, since particularity could never be justified in the one group of citizens-one set of applicable institutions sense; if moral principles imposed obligations then all would owe to all. Thirdly, these requirements do not impose a right. It is not implicit in the claim that one should perform ethical behaviour X or Y that the others have a right against them to act in that specific way. This is the classic differentiation between should and must: the facts that it would be better for myself or others for me to X, or that my Y-ing would bring about morally superior consequences do not entail that I must X or Y or that others are justifiably entitled to my X or Y-ing. Finally, insofar as we start from the standard assumption of natural freedom (meaning that there is no natural duty of subjection), whatever duty moral principles would bring about its satisfaction would have to be shown to be exclusively predicated on restricted obedience for political obligations to work. Whatever impositions moral principles generate then they remain squarely in the realm of ethics. Remember here also that when the content of moral principles and legal obligations overlap it is law that obligates, not the principle directly.

with whatever obligation is desired instead. It all comes down to a question of sufficient capability, and sufficiency for annulling consent is not sufficiency for the generation of obligation; and moral principles may be able to create duties but they do not have the ability to manufacture obligations from thin air.

In these senses, his account is paradoxical: if nullified non-consent is real and presupposes the consequences Estlund imagines, then moral reasons are sufficient for obligation and appeals to consent – or any other source – are superfluous; practice and theory nevertheless inform that they are not. So either Estlund discovered ability beyond what moral theory uniformly awards or the logic in his claims is poisoned.

This one criticism is enough to reject Estlund's normative consent as a compelling theory of political obligation. Still, it pays to at least consider a situation in which non-consent is nullified, at least to see what that looks like. I contend that his main example of a nullified non-consent situation is neither obviously true, nor one in which considerations on the consent of individuals are likely to arise.

“Consider a flight attendant who, in an effort to help the injured after a crash, says to Joe, ‘You! I need you to do as I say!’ Let us not yet suppose this puts Joe under her authority. Even if it does not, Joe would (I hope you agree) be morally wrong not to agree to do as she says (at least under a significant range of circumstances). Once that is granted, the question remains whether by refusing, wrongly, to agree to do as she says, Joe has escaped the duty to do as she says. Consent theory, with its libertarian clause, draws a libertarian conclusion: Joe may have various obligations in such a terrible scenario, but the flight attendant's instructions have no authority over him. Why? Because, luckily for Joe, he is despicable. If you find consent theory's implication implausible here, as I do, then you think that Joe has not escaped the authority by refusing to consent. So he is under authority even without having consented. In this case, non-consent to authority is null. If this is granted, consent theory must be rejected.”⁹⁵

This example is supposed to illustrate the fact that Joe would be wrong in withholding consent from the flight attendant who has assumed authority and that,

⁹⁵ Estlund, *Democratic Authority*, p. 124.

consequently, he has to do as she commands. That the flight attendant (FA) is best equipped to act as the authority in this scenario is one possible conclusion but it is not the only one and it is not obviously or necessarily correct. Although probability indicates it, the fact is that our knowledge of the situation and the agents involved is imperfect: what if Joe were some sort of survival specialist or if the FA mismanaged the situation by failing to prioritize properly or giving out erroneous orders? What if cooperative efforts in which each decided what to do individually, based on know-how, were more productive? Would the FA still retain authority and, if so, why? These questions should encourage us, and Estlund, to consider the fact that in the absence of complete information we cannot isolate the applicable moral reason and discern, with any degree of certainty how they affect the individuals involved. His example is therefore not conclusively one of a scenario in which non-consent meets his criteria. This is not at all surprising given that Estlund himself was, by his own admission, incapable of compiling a definitive list of wrongful and null acts or of providing us with a method of discovering them.⁹⁶ When it comes to the moral reasons that make non-consent wrongful and null, leaving the realm of conjecture is extraordinarily hard.

The bigger problem is that this example very much reads as one underlying the difference between being “an authority” and [merely] being “in authority”, thus bringing us back once again to the issue Estlund has with the very concept, as well as creating broader theoretical concerns about the kind of account he is actually suggesting. Talisse and Harbour make the point that, even if the FA were best suited to assume command, Joe could be submitting to her leadership, rather than her authority. If this were the case, what Joe would have to do would be to *follow her*, rather than to *obey her*.⁹⁷ Estlund denies this on the basis of a presupposition that, unlike leadership, the authority of the FA (and the correlative obligation to obey) survives the making of mistakes. This opinion is not unorthodox; true authority survives error resulting from excusable ignorance to negligence up to the point of reasonable disobedience.⁹⁸ As such, Estlund is correct in claiming that authorities, as opposed to mere leaders, maintain control beyond their mistakes in a way that the latter do not. The problem, however, is that his flight attendant, knowledgeable as she

⁹⁶ *Ibid.*, p. 127.

⁹⁷ R. Talisse, M. Harbour, “Questions about Normative Consent”, *The Good Society*, Vol. 18, No.2, 2009, pp. 48-53, p. 50.

⁹⁸ J. Raz, *The Morality of Freedom*, Clarendon Press, Oxford, 1986, pp. 47-48.

may be, is no actual authority. Everything in his short example, as well as common knowledge about this sort of scenario, suggest that she may be in authority – the person rising up from the group ranks to regulate it, its members and their actions – and have the authority of expertise, but she is no obvious holder of a power right to do so. Thus, any decisions she might make, including those supported by strong moral reasons, are not commands in the sense of political obligation, and the fact of people acquiescing to her demands is not an expression of consent or an instance of discharging obligation but mere going along with someone recognized as a director (the same way children go along with the decision of the more knowledgeable coach, patients with the demands of their doctor, students with the requests of their teachers, and so on). Estlund's flight attendant may, therefore, be the expert and some compliance may lend itself to the situation, but obedience (let alone any theoretically possible obligation) is not in any way caused or conditioned by or on her persona or status. Not consenting to her may be offensive, morally and otherwise, but it is in no way a failure to discharge obligation.

The second issue, as mentioned before, has to do with the shape of his account and is a question of theoretical belonging. Aside from his declared commitment to refashioned consent, Estlund's account reads very much like an orthodox natural duty or urgency account similar to what people like Christopher Wellman have defended.⁹⁹ These accounts attempt to derive obligation from situations of urgency, on the idea that in these scenarios the natural duty to rescue those in peril can only be met if the holders of duty obey. Estlund's account can be placed in this category without difficulty, as obedience is ultimately a way to remove the others from a dramatic situation; the receiver of obedience being in that position specifically because submission to his authority is the only way to save everyone. Re-examining his proposed justification from this perspective could be a saving grace, up to a point. Removing all discussions about a problematic and inconsequential hypothetical consent and about the authority of expertise vs. authority in the political theory sense leaves us with an account of political obligations resting on a single sufficient ground. The problem, however, is that this sort of justification only takes us so far. As will be seen later, the fact that this paradigm barely resembles our mundane political realities,

⁹⁹ Others view it as more akin to an obligation of fair-play or some plain utilitarian consideration. D. Lefkowitz expresses such an opinion. See <https://publicreason.net/2008/02/25/estlund-reading-group-chapter-7/>.

coupled with a persistent inability to demonstrate the content of this duty of rescue to be obedience and to demonstrate particularity brings about its failure as a justification.

To conclude on Estlund, his writings are not conducive to a finding of genuine political obligation. His belief that moral reasons and expertise are a source of political obligation is wide of the mark, and efforts to salvage it by categorizing it as a natural duty of rescue – from which it is virtually indistinguishable, hypothetical consent aside – are not conducive to success for reasons already mentioned and explored further in chapter IV. In the absence of the target of justification of political obligation, the most that can be said about Estlund's account is that it manages to extract some authority from the ability of states to manage complicated situations better than average citizens, thus reinforcing his larger claim on authority as the province of democracies most adept at reaching true and correct decisions.

The failures of hypothetical consent as a justification of political obligation had a two-pronged effect. On the one hand it forced political theory into the realization that that this practice of changing consent to the point of “disfigurement” has no pay offs, both because it has no good results as far as justification is concerned, and because it opens the door for degenerations into something that could either function as a thesis of authority or into something theoretically unremarkable that fails to distinguish itself, in any relevant manner, from the more straightforward claims of bona fide, declared natural duty efforts.¹⁰⁰ On the other hand, consent theory as a whole, left without what most considered its last standing leg, was by and large shelved as an explanation of political obligation. The collapse of the theory brought about new efforts to come up with alternative justifications of political obligation that could make up for its faults and better capture the realities of socio-political life; this is how principle of fairness and associative accounts of obligation came to be. The principle of fairness is the topic of concern of the second part of this chapter. It is the last attempt at resolving the problem of political obligation on voluntarism/transactionalism and the idea that has dominated the thought on the requirement to obey for the better part of twenty-five years. Its eventual failure, at the

¹⁰⁰ I say mutilation because this consent does barely mimic actual consent, embrace voluntarism or pays as much attention to bindingness and compliance. C. Stark, “Hypothetical Consent and Justification”, in *The Journal of Philosophy*, Vol. 97, No. 6, 2000, pp. 313-334, pp. 316-320.

hand of Simmons, marked the total collapse of voluntarism and its definitive replacement with non-voluntarism.

The Principle of Fairness

H.L.A. Hart

H.L.A. Hart was the one to introduce the principle of fairness as a [sketch of a] justification of political obligation in his now seminal article “Are There Any Natural Rights?”: There he held that “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission...”.¹⁰¹

His brief comments are clear insofar as the application of the principle is concerned, with it being conditioned on the existence of an enterprise governed by a firm set of rules designed strictly to regulate the behaviours of individuals who participate in it and who profit from it on a regular basis. Unfortunately, Hart does not explain further what type of “project” counts as an enterprise, why is a governing set of rules necessary, and whom exactly the class of beneficiaries is comprised of.

There are two obvious issues with Hart’s bare-boned articulation of the principle. Firstly, how one becomes a member in an enterprise or remains an outsider should have been firmly determined; Hart’s failure to mention the mechanisms, methods or procedures for acquiring/avoiding membership is bound to become problematic in situations in which the high costs of membership, or suspicions of free-riding or of forceful “conscriptation” into the enterprise make necessary a precise identification of the principle’s subjects. Secondly, Hart’s insistence on rules could also cause qualms. Although efficient cooperative enterprises not governed by rules seem somewhat farfetched, the fact of the matter is that the cooperation they require is not predicated on the existence of governing rules, the principle of fairness being capable of triggering a duty to cooperate regardless of the existence, quality or specificity of regulative norms.¹⁰² His paragraph is therefore misleading in the senses

¹⁰¹H.L.A. Hart, “Are There Any Natural Rights?”, *The Philosophical Review*, Vol. 64, No. 2, 1955, pp. 175-191, p. 185.

¹⁰² Simmons agrees. His intuition is that whenever an enterprise exists and benefits are accrued from participation the requirements of fair play should be met regardless of the “tidiness”, neatness or

that it can give the impression that there is a relationship of dependence between rules and the cooperative requirement – there is not: a disorganized enterprise providing members with benefits is still one owed fair-play and its content. Since Hart writes no more on the principle though, the gaps in his original justification had to be filled by others, specifically Rawls and then Klosko.

John Rawls

Rawls proposes the principle as a justification of the moral requirement to obey on a voluntarist reading in the era immediately preceding his commitment to the natural duty of justice. He makes a few changes to the Hartian principle. While he retains one of the original conditions – that the cooperative scheme should be governed by rules – he redefines the “enterprise” governed by the principle as a mutually beneficial and just “active scheme of cooperation”, adds a free-riding clause that links the possibility of benefaction to a generalized avoidance of unfair profiting and, most importantly, states that becoming bound to a scheme is not contingent on mere receipt of goods but on “having accepted and our intention to continue accepting the benefits of a just scheme of cooperation”.¹⁰³ These are all evident in the following quote:

“The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperated. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the senses that if any one knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits

cohesion of the enterprise. A.J. Simmons, “The Principle of Fair Play”, A.J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press, Cambridge, 2001, pp. 1-27, p. 4.

¹⁰³ See J. Rawls, “Legal Obligation and the Duty of Fair Play” in S. Freeman (ed.), *The Collected Works of John Rawls*, Harvard University Press, Cambridge, 1999, p. 122. Also, see Simmons, “The Principle of Fair Play”, p. 5.

of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating”.¹⁰⁴

Rawls’ additions are significant. First, there is the free-riding condition. Rawls is convinced that benefaction is only possible when participants in a scheme discharge their duties of return fairly; this in turn implies that failure to cooperate is unfair and morally reprehensible. That may not be true. Though free-riding is in and of itself [at least] objectionable, a single – or repeated – act of it is very unlikely to endanger benefiting, much like individual cooperative discharges are unlikely genuinely to affect the production and distribution of benefits. This begs the question of whether a diagnostic of morally *reprehensibleness* for free-riding is justified *ab initio*. And if this occasional or habitual free-riding does not deprive others of benefits what are the implications for the obligation to obey? It seems possible that inconsequential free-riding, while unfair as a matter of principle, is not unfair vis-à-vis other participants in the scheme, i.e. participants who remain unaffected by individual X’s non-performance, or by his performance. Then, if the benefiting of others and benefiting itself are indemonstrably influenced by X’s non-cooperation, can it really be said that X is under an obligation to fair-play? The point here is that common senses and moral intuitions encourage telling an individual “you are obligated by your own benefaction and under fairness in cooperation” but further probing reveals it is much harder to defend the claim in the face of retorts that his or hers actual or theoretical free-riding does not have the consequences ascribed by proponents of the principle and therefore may fail to impose a duty. Ultimately, the individual could answer that a point of general principle is used to impose heavy burdens on him without his actions having any concrete, real life effect on the scheme and other members. He could argue fair play to be a well-mannered response dictated by etiquette and social rules, but not authentically mandatory; he could object that “jerkiness” does not one “unjustified, unfair disobeyer” make. Still, it is understandable why Rawls felt compelled to introduce the clause. It is the sort of thing morality dictates and minimally acts as a safeguard of efficiency (although inefficiency automatically precludes neither the application of the principle nor benefaction).¹⁰⁵

¹⁰⁴Rawls, “Legal Obligation and the Duty of Fair Play”, p. 122.

¹⁰⁵Simmons, “The Principle of Fair Play”, p. 4.

Secondly, he introduces a just condition, discoverable in the phrase “suppose there is a mutually beneficial and just scheme”, evocative of his life-long preoccupation with the issue. What is more mysterious, however, is what Rawls means by this and how it affects cooperation, if at all. We can speculate that a scheme can be just in two different senses: if it pursues a non-morally objectionable goal or if it distributes benefits justly between members, whatever that may mean (it could mean proportionally to reciprocation, it could mean equally, it could entail proportionality with needs, etc.).¹⁰⁶ Slim chance that Rawls meant to convey the former, nothing in his work suggesting that: although moral theory presupposes broad agreement on the idea that a nefarious goal is incompatible with obligation, this could not be the type of “just” Rawls had in mind: i.e. that, under the principle of fairness, whenever a functioning cooperative scheme governed by rules and supplying benefits can be discovered obligations of reciprocity exist regardless of the morality of goals:

“....the intuitive force of the principle of fair play seems to be preserved even for criminal conspiracies, for example. The special rights and obligations that arise under the principle are thought to do so because of special relationships between the cooperating parties.... No reference is made here to the morally acceptable status of the scheme”.¹⁰⁷

Although scholarship resists the idea of “immoral obligations”, Rawls gives no indication that he intended his principle to be restricted to those cooperative schemes pursuing obviously moral purposes. Such a limitation would undoubtedly prove to be challenging, as it would create the necessity of moral evaluation and bring about a whiff of paternalism. Subsequently, it seems permissible to conclude that “just” could not have been intended as a confirmation of the morality of the scheme.

The second senses appear to be more readily in tune with Rawls’s intention: a scheme is just insofar as participants are “allocated at least a fair share of benefits” in return for having borne a fair share of the burden.¹⁰⁸ Simmons has issues with this meaning. While he understands that Rawls’ motivation was a desire to ensure that no one be required to carry the designated share of the burden of cooperation when they

¹⁰⁶Simmons agrees. Simmons, “The Principle of Fair Play”, pp. 6-7.

¹⁰⁷*Ibid.*, p. 7.

¹⁰⁸*Ibid.*, p.7.

have not been allocated a correct amount of benefits, Simmons thinks this is an instance of Rawls overreaching. He reads Rawls as requiring that *everyone* be given a fair share of the burden/benefit in order for any one X individual to be considered obligated under the principle of fair-play, an idea with which he disagrees.¹⁰⁹ According to him, as long as an individual has been assigned a fair share of the benefits he is bound to discharge his share of the burden, regardless of how equitably benefits have been paid onto the others or of how distribution is done generally. Besides this, Rawls' writings on the principle of fair play (or even our own "intuitions" about it) do not suggest that individuals who have cooperated in an unjust scheme, but who have still received a fair share of the benefits, are somehow exempt from obligation. In these conditions, Simmons concludes that the justness of the scheme does not actually entail anything relevant about obligation.

Simmons makes a valid theoretical point. One could be a co-operator in the most disgustingly motivated, most haphazardly distributing cooperative scheme in the universe, yet, as long as benefits are accepted once profits are received, a requirement to comply ensues independently of the scheme's moral worthiness or, more importantly, of the scheme's fair or unfair behaviours towards other members. But again, as the principle was intended as a general ground of political obligation with blanket efficiency, the question becomes "how many individuals living in an unjust state are likely to receive a fair share of the benefits?". Probably not very many, certainly not enough to be able to speak of a majority of them (in the scheme) as being politically obligated under the principle of fair play. Thus, while Simmons' claim that some people can have obligations even towards schemes that victimize others is perfectly plausible, we have to allow that, as far as political obligation is concerned, Rawls' justice condition acts as a guarantee for the general applicability of the principle.

Simmons nonetheless does not see this. Insisting on his point, he moves on to explain that, even if we become tempted to alter our understanding of a "just scheme" from a scheme in which everyone receives a fair, equal share of the burden and of the benefits, to a scheme in which the benefits awarded are proportional to the burden carried, Rawls' justice condition continues not to appear as absolutely mandatory. On this reading of the clause everyone who has received a portion of the benefits

¹⁰⁹Simmons, "The Principle of Fair Play", p. 8.

produced by the scheme – be it large or small – has a duty to shoulder their fair share of the burden. The only caveat is that those who have received fewer goods from the scheme have a weaker duty to support it than the ones who have profited more from it. While he acknowledges that in cases of schemes in which burdens cannot be distributed unequally this sort of interpretation of the phrase “fair share” cannot apply, he thinks that in the cases in which it is appropriate it still does not show why the justice condition is necessary. Simmons believes that, on this reading, the best example that could be construed in favour of the justice condition would be the one of an unjust scheme that requires the cooperation of both those it rendered better off and those it mistreated by distributing inequitable shares of the benefits. This worrisome example might encourage thinking that it would be best to restrict the principle of fairness to just schemes so that, even if we draw few benefits from them, that amount is still fair in the sense that it is proportional to the cooperative effort we have put in. Simmons denies this, however. He argues that in cases such as the one above, other moral considerations (not specified) or non-acceptance will interfere and “may override the principle of fair play”.¹¹⁰

This is an instance of splitting hairs. The state is not the kind of scheme that divides citizens into classes corresponding to distinct levels of benefaction and subsequent distinct levels of obligations, hence discussions about differentiations and proportionality in duties to obey are off-topic. What matters genuinely is if the justness, or unjustness, of scheme state has any actual effects on obligation and on individual acts of discharge. The answer, on this reading, is that it does not. Rawls’ principle of fairness is a voluntary account and, as such, as long as subjects willingly accept benefits, as he claims, they owe obedience even to unjust schemes, at least until benefactions cease and disobedience becomes reasonable and justifiable. Rawls’ just condition, though meant to act as a safeguard, has therefore no causal or deterrent impact on obligation: once agents become members through acceptance and benefit they are bound regardless of the moral nature of the scheme itself, this irrelevancy actually working to the advantage of the account by excusing members from discovering duty only when moral evaluations indicate that justness permits it. Acceptance alone is thus a sufficient, perfect ground of obligation because it is an

¹¹⁰Simmons, “The Principle of Fair Play”, p. 9.

expression of will. The only issue with this is that, much like express consent, it is impossible to discover.

The Issue of Acceptance

The most significant contribution made by Rawls to the principle of fairness is making its application contingent on acceptance. Acceptance plays a powerful double role in his account. On the one hand, it confirms purposely, knowingly performed acts as bringing about both benefaction and obligation. On the other hand, it has transformative power, changing outsiders into full scheme members (with voluntarily acquired status), thus negating accusations that the principle allows for roping in and settling individuals with underserved duties and Nozick's opinion that the membership issue cannot be resolved without appeals to acts committed prior to benefaction that would change the ground of obligation and force the theory to collapse into consent.¹¹¹ Any problem acceptance may have is therefore not one of generational or sustaining power; it can perform the tasks with which it was settled by Rawls. Its only issue is that it cannot be discovered often enough in real life to justify a duty to obey the laws of the state. ~~Conformity~~ conformity poisons the well again.

Acceptance's absence can be seen as the result of one of two reasons: (1) either because state-provided benefits are "open benefits" available to all, undeniable and basically unavoidable, as Simmons suggests, or (2) because none of the state's provisions trigger the mental responses associated with true, wilful, acceptance, as I argue.

Simmons writes that, while it is not feasible to deny that citizens receive these open benefits from the state, we have little reason to conceptualize them as having been accepted. His view is that the only way in which acceptance can be established is by showing that citizens actually believe that open goods are the results of

¹¹¹ In *Anarchy, State and Utopia* Nozick expressed his conviction that fairness is beaten to the punch as a source of political obligation. The underlying assertion in his opinion is that scheme insiders can only be those who have performed some sort of act- oath, pledge, tacit agreement, assumption of significant role within the scheme, etc.- to renounce their status as former outsiders. As such if individuals have to perform the type of acts mentioned above to become insiders, that act binds them to the scheme long before any potential acceptance of cooperative benefits had the chance to do so. Without being theoretically wrong he ignored the power of Rawlsian acceptance. Through it his principle of fairness can generate obligation without the need of a prior indication of an intention to participate in the scheme. Nozick's critique is therefore not devastating to the principle. See R. Nozick, *Anarchy, State and Utopia*, Blackwell Publishers, Oxford, 1974, p.93.

cooperation and worth their costs, and that they would choose to take them even if they had the option to refuse.¹¹² He justifies these two requirements as the only appropriate evidence of voluntariness (the latter) and of the state as being an actual cooperative scheme (the former). Simmons is, however, entirely reluctant to believe that average modern citizens exhibit an attitude of acceptance; on the contrary, he suspects that they “barely notice and seem disinclined to think about” state benefits, that they think them to be received from the state at exorbitant rates, and that more often than not they “commonly regard [open benefits] as purchased (with taxes) from a central authority”.¹¹³

More radical than Simmons, I doubt that citizens even think of the open goods he mentioned as benefits at all. I believe most individuals imagine benefits to be only those things to which they can ascribe a monetary value or perceive as coming from “the goodness of the State’s heart” (scholarships, reductions in fees, compensations, aid, etc.). Everything else – from infrastructure to pensions – they more likely perceive as entitlements derived from tax paying and general compliance. And people who do not think of what they receive as *stricto sensu* benefits from a state they do not recognize as a cooperative scheme (more on this later) are people who cannot be said to have “accepted” in a sense that meets the knowledge-intentionality-deliberation conditions attached to it as a wilful, consensual act.

To drive this point further I suggest two alternative understandings for the term “acceptance” that should make its absence in real-life situations even more obvious: acceptance in the weak senses and acceptance in the strong senses. The first version presupposes the presence of a “hearty” psychological dimension – individuals must want the benefit offered and know (or at least intuit) that it is the result of cooperation – and of an emotional one composed of beliefs such as “worthiness” (of accepted benefits, in term of how valuable the good is for the individual) or cost appropriateness. Conversely, weak acceptance is much less complex. It is predicated only upon the individual wanting a benefit and making an effort to obtain it that could be as little as making sure he is in the right place at the right time. Arguably, important, unavoidable and omnipresent public goods can be conclusively shown to trigger neither the psychological and emotional components associated with strong acceptance nor the “wanting” and “making efforts” linked to the weak one. National

¹¹² Simmons, “The Principle of Fair Play”, p. 23.

¹¹³ *Ibid.*, p.24.

defence is a good example of this. First of all, it is likely that citizens typically regard security within the borders as an endeavour paid for through taxes and sustained by the concerted efforts of very specific groups of people that occupy military and governmental functions, rather than as ensuing from popular cooperation. Secondly, under conditions of peace, we have ample reasons to think that they seldom take the time genuinely to appreciate the positive effects it has on their life. Thirdly, if asked, most would probably say that the daunting, burdensome and permanent demands the providing state makes in exchange for it are exaggerated repayments. Moreover, although at a deeper level they probably desire security above all else, if, given the opportunity to have a direct say in how taxes are employed, it is likely they would either direct the funds towards more visible public projects, or choose to retain that money for private pursuits which. Finally, the overwhelming majority of citizens make no efforts to obtain it: much like the national health and educational systems or the political apparatus, national defence is simply “there”, not very different from a random fact of life – we are safe or we are not. The same sort of arguments extends to all other open goods. Realistic claims about the acceptance of state-delivered public benefits are therefore doubtful on any interpretation of “acceptance”, no matter how generous. As such, even if we accept (sic!) all of his previous contentions, Rawls’ account fails because the purported ground of obligation, though theoretically excellent, does not materialize in the real world, entailing, yet again ~~C7conformity~~.

One closing charge to be made against the Rawlsian version of the principle is a now standard one that it marshals a conception of the state that hardly reflects life and interactions between states and citizens. Simmons was particularly adamant about this. In “The Principle of Fair Play” he wrote that he does not “think that many of us can honestly say that we regard our political lives as a process of working together and making necessary sacrifices for the purpose of improving the common lot” and that “where there is no consciousness of cooperation, no common plan or purpose, no cooperative scheme exists”.¹¹⁴ Twenty years later, when he assesses some of the later developments in the principle of fairness (particularly Klosko’s theory, which will be discussed next), he comes back to reinforce his point by arguing that “there is a vast moral difference between genuinely collaborative efforts for mutual benefit” and the accidental coordination that occurs when people live in the same territory and which

¹¹⁴Simmons, “The Principle of Fair Play”, p. 25.

occasionally produces not only individual benefaction but also a communal one.¹¹⁵ Simmons understands cooperation as being about common motivation and at least a minimal awareness (among participants) that they are working towards a shared goal. To his mind, nothing in the configuration of modern states suggests they are a scheme of cooperation.¹¹⁶

This thrust is noticeably endorsed by reality. Most of the intuitions people have about fairness and cooperation come from the experience of having been a member in some small scheme in which people know each other and work in an orchestrated manner towards the fulfilment of whatever fixed ambition. Proponents of the principle of fairness as a ground for political obligation extrapolate from these little enterprises to the enormous state and imagine that nothing is lost in the process. This is, to an important degree, implausible. Within the enormous group that is the state, people by and large individualistically pursue their own interests. And while it would be incorrect to claim that citizens never make orchestrated efforts or genuinely cooperate (in the full meaning of the word) towards some commonly desired good, the fruits of this cooperation are much more limited in availability, scope, cost and inclusivity than the benefits states provide in ways that do not make them feel or think they have been involved with a determinant role in either production or delivery. Factor in the previously expressed conviction that people are more likely to think of state benefits as appropriate and expected repayments for taxation, and the diluted, or non-existent, relationships between the millions or billions of members of states, Rawls' conception of the state as a cooperative scheme patterned on the same model as small, voluntary enterprises is evidently flawed. Still, as far as assumptions go, it is not one that goes against the conformity criterion established in the methodology, in the sense that, while closer to the outer limit of acceptability, it is not far-fetched to the point that it becomes toxic to the justificatory narrative, at least not on this account in which will is the ultimate source of political obligation. The problem with this assumption, therefore, is not so much that it is "unrealistic", but that it invites considerations of fairness in a context in which it may not apply, or apply minimally; other principles more obviously governing citizen interactions than it. Since will is

¹¹⁵ A.J. Simmons, "Fair Play and Political Obligation: Twenty Years Later", A.J. Simmons, *Justification and Legitimacy*, Cambridge University Press, Cambridge, 2001, pp. 27-43, p. 39.

¹¹⁶ Simmons, "Fair Play and Political Obligation: Twenty Years Later", p. 41.

present though, threats implied by this are kept in check, problems truly arising out of this inconsistency only when it is removed from the account.

The idea that citizen bodies are not disjoined sums of individuals but groups with many and significant commonalities, including of purpose and interest, will recur in the history of the thought on political obligation but it will not be under the umbrella of voluntarism. So will the principle of fairness. While Rawls renounced it in favour of his non-voluntary justification from a natural duty of justice, others, most noticeably Klosko, picked up the baton and tried to salvage it. This would prove to be an arduous task because, such as it was post-Rawls, whatever new argument was going to be produced would need successfully to address the membership issue in a way that would not introduce some new, ground-changing act, that would not entertain a too tenuous relationship to reality or make exaggerated claims about people, their actions or mental states, and that would negotiate the complicated relationship with voluntarism. Klosko will come closest to accomplishing this task, by sacrificing the latter.

George Klosko

In his articulation of the principle, Klosko relies heavily on the previous work of Richard Arneson. He was the one to tie the application of the principle of fairness to the distribution of public goods, and the one to first suggest that obedience to the law is the fair-play repayment owed to a state that has fairly distributed non-excludable public goods to its citizens. This idea would have tremendous influence on Klosko who, as we shall see in the next pages, marshalled a non-voluntary version of the principle that rests on it.

Arneson came to the conclusion above about the relationship between public goods and fairness in “The Principle of Fairness and Free-Rider Problem”, an article in which his main intention was to defend the principle from Nozick’s critique.¹¹⁷ Unlike Simmons, who rejected this objection by reminding us of the force of Rawlsian acceptance, Arneson argued that some benefits can produce obligations of

¹¹⁷ R. Arneson, “The Principle of Fairness and Free-Rider Problems”, *Ethics*, Vol. 92, No.4, 1982, pp. 616-633, p. 617.

reciprocation, even if they have not been voluntarily accepted. These benefits are those public goods that exhibit three features: they are available to all citizens, insofar as X's consumption of public good G leaves just as much and as good G for others; they are impossible to deny to particular groups of disqualified people (they are non-excludable); and they are consumed in identical quantities by all citizens.¹¹⁸ In short, the benefits that generate duties even in the absence of wilful acceptance are non-excludable, collective benefits that can be neither voluntarily rejected, nor voluntarily accepted, and that require the cooperation of all simply because all must receive.¹¹⁹

Klosko was inspired by Arneson to by and large eliminate all pretences to knowledge, intentionality and deliberation, not by embracing non-voluntarism per se, but rather by placing the principle of fairness outside of the logic itself: i.e. it is not so much that his principle is non-voluntary, it is that it cannot be voluntary.

In "Presumptive Benefit, Fairness, and Political Obligation", Klosko thus follows Arneson in arguing that the "limiting argument"¹²⁰ – the argument that one's mere receipt of benefits cannot obligate one to cooperate towards the purposes of a scheme – can be defused if the conditions of the principle of fairness are changed so as to include the requirement that the goods received "be important" and "worth the recipients effort in providing them and presumptively beneficial", i.e. non-excludable public goods (henceforth NEPGs).¹²¹ In this perspective, his main contention is that, as far as that category of public benefits that are necessary for the good life are concerned, receipt can generate obligation even in the absence of acceptance.¹²² Klosko is convinced that the indispensability of presumptively beneficial public goods "overrides the outsider's [of a scheme] usual right to choose whether he wishes to cooperate" or not.¹²³ Thus, for him, the magnitude/value of a cooperative public good is enough to generate obligation.

¹¹⁸ Arneson, "The Principle of Fairness and Free-Rider Problems", p. 618.

¹¹⁹ *Ibid.*, p. 619

¹²⁰ G. Klosko, "Presumptive Benefit, Fairness and Political Obligation", *Philosophy & Public Affairs*, Vol. 16, No. 3, 1987, pp. 241-259, p. 244.

¹²¹ Klosko understands presumptively beneficial goods in the same manner Rawls understood primary goods: public goods that "all members of the community want, whatever else they want, regardless of what their rational plans are in detail". J. Rawls, *A Theory Of Justice*, Harvard University Press, Cambridge, 2001, p. 92.

¹²² It is worth mentioning here that he is not altogether convinced by Simmons claims about acceptance in *Moral Principle and Political Obligation*, although he does not take time to explain why that is so. Klosko, "Presumptive Benefit, Fairness and Political Obligation", p. 249.

¹²³ *Ibid.*, p. 247.

Klosko parts ways with Arneson, however, when it comes to restricting his theory to non-excludable goods. Realizing that such a limitation could at best justify obligation only towards a minimal state, in the same article he extends his line of thought so as to include discretionary public goods (DPGs).¹²⁴ Discretionary goods are explained to be goods that, despite not being individually necessary for proper living, are required to sustain the provision of non-excludable ones. Consequently, Klosko claims that, while a cooperative scheme's provision of a single discretionary good cannot produce obligation, when they are delivered as items supplementary to the packages of NEPGs *already* being provided by the scheme, they produce additional obligation for beneficiaries.¹²⁵ This clarification is supposedly fundamental for his argument. According to Klosko, it serves to shift the burden of proof: instead of him having to prove that citizens have additional obligations for this secondary, non-important category of goods as well, it is for people that already have to participate in the provision of the NEPGs to show that the extra involvement demanded by the supplementary delivery of DPGs makes the overall costs of participation exceed the total worthiness of goods obtained. Thus, unless it can be shown that benefaction has decreased overall as an outcome of the addition of DPGs, or that the scheme has become unfair, people continue to remain obligated.¹²⁶

When he picks up the principle again, in his *The Principle of Fairness and Political Obligation*, Klosko keeps his argument almost identical, introducing only a few new relevant details about the benefits provided by the state. On the one hand, as far as presumptively beneficial public goods are concerned, they are now described as having two central features. First, as we knew from before, they are indispensable, a fact which continues to “override the outsider’s usual right to decide whether he wishes to cooperate” (with people having to input into non-excludable schemes whether they want to or not), and to guarantee that the costs on non-excludable goods, no matter how high, low or demanding, are always worth paying.¹²⁷ Secondly, as a novelty, Klosko also explicitly underlines the absence of any link between non-excludable goods and particular mental states. Individuals do not have to believe they draw benefits in order to become obligated: if the proponents of a scheme can

¹²⁴*Ibid.*, p. 254.

¹²⁵*Ibid.*, pp. 254-255.

¹²⁶ *Ibid.*, p. 256.

¹²⁷G. Klosko, *The Principle of Fairness and Political Obligation*, Rowman & Littlefield, Oxford, 1992, p. 54.

convince that a non-cooperator displays the attributes of a beneficiary, they have a right to demand reciprocation regardless of the subject's opinion (about whether or not they are genuinely benefiting, about the importance of the goods received, about the source of the goods, etc.). Nor do the subjects of obligation have to acknowledge (or even realize) that non-excludable goods are products of cooperation. Klosko insists that requiring awareness of these factors is self-defeating because, independently of them, the important nature of these goods makes receipt and the supervening obligation to cooperate unavoidable. Similarly, regarding discretionary public goods, Klosko introduces two sub-clauses: an *indirect* one, which establishes that discretionary goods must (1) be added to a scheme through fair and democratic procedures governed by majority rule, (2) not increase the overall cost of the scheme to the point of outweighing benefits, and (3) be as fairly distributed as presumptive goods in order to produce an obligation of reciprocation;¹²⁸ and an *institutional* one which aims to justify compliance with laws regulating discretionary goods by invoking both the superior level obligations individuals incur in return for presumptive goods (obligations that in his opinion cover discretionary ones as well) and the "corrosive effects of disobedience".¹²⁹

Klosko's argument is, at face value, excellent: he manages to find a way for benefaction to change the normative situation of the individual by settling with an obligation of fair-play whose content is a requirement to obey while marshalling more moderate claims about the state as a cooperative scheme dedicated to the provision of goods of such importance that receipt, almost unavoidable, is sufficient to generate duties. Deeper analysis reveals issues however, almost all discovered, as mentioned, by Simmons.¹³⁰

Simmons responds to Klosko's version of the principle of fairness in his 1987 "The Anarchist Position: A Reply to Klosko and Senor" and then later in his "Fair

¹²⁸ *Ibid.*, pp. 86-95.

¹²⁹ *Ibid.*, p. 101.

¹³⁰ What followed Klosko's original enunciation of his principle was the single longest debate between two scholars on a proposed justification of obedience. Klosko v Simmons became a seminal debate in the moral philosophy of obligation, with Simmons' eventual triumph over what is undoubtedly the most compelling modern argument for the requirement to obey marking a crucial moment when both voluntarism and the principle of fairness were abandoned. Because of the dialectic fashion in which Klosko's principle was developed, and the dominion Simmons has over criticisms, I will explore their arguments and counterarguments in the form and logic they were originally delivered – as a dialogue.

Play and Political Obligations: Twenty Years Later”¹³¹. In his original piece, Simmons produces three counter-arguments to Klosko’s account. The first one (which appears to be Simmons’ main concern) stresses Klosko’s obscure view on the relationship between indispensability and fairness-generated obligation. Simmons has trouble grasping why Klosko feels that “indispensability is relevant to fairness”.¹³² His main intuition is that the importance of a benefit is likely to bring forward moral principles other than fairness; the duty to help those in need and to promote happiness come to his mind. The following passages make this abundantly clear:

“I believe the magnitude or importance of goods functions in two ways in Klosko's argument; but neither works to the advantage of his position. First, it seems clear that one reason why intuitions of obligation follow perceptions of indispensability is that the importance of benefits brings other moral principles (besides the principle of fairness) into play. Our duties to promote happiness and to help those in need, for instance, are actuated by occasions for providing indispensable goods. But these duties have nothing to do with fairness;.... But magnitude of benefit seems important in a second way as well. Klosko's examples are supposed to show that active participation (and the attitudes and beliefs I have argued best explicate participation in non-excludable schemes) is not necessary for one to have obligations to support a scheme....This suggests not that participation and attitudes are unimportant, but that magnitude of benefit is important only because participation is.”¹³³

And:

“Klosko repeatedly emphasizes the great importance of presumptive public goods in arguing for our obligations to their provision.... Klosko is not emphasizing what a fairness theory of political obligation should emphasize. Klosko...makes the easy but fatal slide from genuine concern about fair play (i.e. not taking advantage of co-operators) to quite distinct moral concerns about required charity of beneficence

¹³¹This article is written as a rejection of the entire tradition, not devoted to one author specifically. Because Klosko makes no major changes to the principle in his first book, Simmons’ articles will be taken to function as a critique of both.

¹³²A.J. Simmons, “The Anarchist Position: A Reply to Klosko and Senor”, *Philosophy & Public Affairs*, Vol. 16, No. 3, 1987, pp. 269-279, p. 272.

¹³³ Simmons, *Ibid.*, p. 272; 273.

(i.e. helping provide others with what they need), justifiable paternalism (i.e. requiring others to accept what they themselves need), and moral necessity (i.e., contributing to projects in ways that others have a prior right to, independent of our having benefitted from their sacrifices within the cooperative scheme).”¹³⁴

In the article Simmons also expresses misgivings about Klosko’s opinions on participation, specifically the way in which he understands the relationship between indispensability, participation and obligation. He reads Klosko as trying not to pay any particular attention to participation – and the accompanying beliefs and attitudes – because it supposedly plays no part in the genesis of obligation. Simmons thinks, however, that Klosko’s insistence on indispensability ends up putting participation under the spotlight anyway, because of the underlying intuition that the more we enjoy and want a good the more inclined we are going to be to participate in its provision. To Simmons, “this suggests not that participation and attitudes are unimportant but that magnitude of benefit is important only because participation is”.¹³⁵ Based on footnote 22 in Klosko’s “Presumptive benefit...” he believes Klosko came close to admitting as much. Simmons therefore concludes that, all in all, indispensability is not so much a standard condition for the application of the principle of fairness as it is “an indication of when the requirement of active participation is most likely to be satisfied”.¹³⁶

Simmons’ counterargument so far can be summed up as this: indispensability is no way to get around the limiting argument because, a) it is more likely to bring about obligations under principles other than fairness (obligations presupposed by natural duties, in all probability) and, b) because indispensability is not really a necessary condition for the existence of an obligation of fairness but an indicator of the probability of participation, making it not only an improper point of emphasis for an argument that purports to ground obligation on fairness, but a weak ground of obligation *tout court*.

The second objection is a too strong reading of Klosko’s claim. At no point does he predicate the general existence of a principle of a fairness-regulated relationship of reciprocation on the condition that the items supplied be non-trivial.

¹³⁴ Simmons, “Fair Play and Political Obligations: Twenty Years Later”, p. 35.

¹³⁵ Simmons, “The Anarchist Position: A Reply to Klosko and Senor”, p. 273.

¹³⁶ *Ibid.*, p. 273.

His argument from indispensability is merely supposed to show that fairness can dictate moral obligations in the absence of expressed will. In this sense, his claims from indispensability mimic hypothetical consent, insofar as they both attempt to convey that, if presented with actual choice, citizens would not opt-out, would want and value what is being offered, and would accept the costs of provision. Indispensability therefore is supposed to bridge a gap. As for participation, I read Simmons as saying that, overall, beliefs and attitudes are much more relevant to the application of the principle than Klosko thought or would openly acknowledge (an admission which Simmons seems to believe would be detrimental to Klosko's efforts). If so, then Simmons' intention is likely to argue that the assumption of indispensability is the kind of exaggerated claim that cannot be used to sustain obligation. I find, however, that we have no reason to suspect Klosko of being disingenuous. Klosko was very much aware that a good can be considered indispensable only when an overwhelming majority of people believe that it is required by the good life, that indispensability is the result of a uniform – or at least predominant – belief. Nevertheless, he is not concerned with finding solid proof of these sorts of opinions, at either an individual or collective level. He utilizes a “rough standard of reasonable beliefs” which dictates that having “strong, reasonable grounds” for believing that any community C will find good G to be indispensable to well-being is “tantamount” to community C actually regarding that good as indispensable.¹³⁷ Klosko hence acknowledges the role of beliefs and attitudes in the actual process of assignation of importance [to benefits], but his initial assumption of homogeneity in tastes concerning open benefits simply affords him to ignore potential discrepancies between actual individual opinions. In other words, he concedes that indispensability is often an evaluative conclusion (not always though – the significance of some benefits is obvious) but makes no effort to discover evidence of it, either intellectual, in the guise of expressed opinions, beliefs, convictions, or actual, in the form of participation in the procurement and delivery of the good. As far as assumptions go, this one is largely inoffensive and very likely legitimate: as a matter of practice we do not expect people to voice their concern, or want for some things, or to be actively involved in obtaining them in order to consider them desirous. For example, few of us routinely lapse into spiels about the importance of

¹³⁷ Klosko, “Presumptive Benefit, Fairness and Political Obligation”, footnote 22, p. 247.

clean water or national defence or take part in filtering or machete sharpening operations but it is still perfectly reasonable to assume we want to ingest potable water while not being attacked by barbarian hordes. So Klosko can be forgiven for this since, as of yet, C7conformity is not endangered. What truly matters, however, is whether this assumption of indispensability can be used to sustain obligation. In this direction, I hold that it seems bizarre to outright deny that indispensability has any effect on our duties, at least in as much as the truly necessary benefaction of others is contingent on our actions; but the fact that indispensability could settle us with some duty does not mean it does settle us with political obligation. The biggest question about the rule of cooperation is not whether it exists, *but whether its content necessarily takes the form to submission to law.*

This brings us to the first of Simmons' counterarguments. This objection speaks of his ultimate conviction that Klosko's version of the principle is really a natural duty account attempting to settle political obligation as the predicate of a duty that demands we participate in the provision of others with indispensable public goods; what matters then is not fairness, but actual possession. This is a legitimate interpretation, given Klosko's underlying non-voluntarism and given the fact that moral discourse about things necessary for the good life, about external involvement in the supply of the necessary and about moral principles compelling us to helpful/Samaritan/charitable actions pertains to natural duties. This then begs a question whether or not Klosko has miscategorised his own work and whether obedience is the content of a natural duty regarding goods indispensable to the acceptable lives of others, rather than the content of a principle of fairness. In other words, Simmons worries that Klosko misidentified his grounds. Nonetheless, focusing on this, as Simmons does, is an instance of failing to see the forest for the trees. What is truly problematic is not whether or not Klosko's account is more akin to natural duties or whether or not the argument from indispensability brings about considerations other than fairness, but why reciprocation, be it the substance of a duty or a requirement imposed by the principle of fairness, *must necessarily take the form of obedience.* The important question is not "of what is obedience a content of" but is obedience content at all? Klosko's issue is not one with CO1A or CO1B strength-

degeneration but a crippling one of jumping the gun from “benefiting imposes” to “benefiting imposes obedience and only obedience”, hence ~~CO4~~precise content.¹³⁸

Klosko equates “the rule of cooperation” – i.e. the rule that requires the members of a scheme to cooperate, in the manner deemed fit, as repayment for the benefits they have received – *to be* the moral requirement to obey the law. In other words, he assumes obedience towards the law to be the only and full content of the rule of cooperation as well as the “fair share” of the burden everyone is supposed to shoulder in return for fair benefaction.¹³⁹ Obedience, however, has to be shown to be the exclusive content of an obligation or duty. In the absence of this demonstration, what the principle accomplishes in a best-case scenario is simply changing the normative situation of the beneficiary by settling him with a duty whose content is not obviously obedience and consequently open to interpretation. “How do we know that the only and best way to play fairly is to obey the law” is a legitimate question. In other words, while moral theory leaves little doubt that benefaction comes with some burden of reciprocity – the content of that burden need not necessarily be a moral requirement to obey the law. Klosko’s readiness to assume that is a fatal error for his account of political obligation since this cannot claim obedience to be wilfully contracted through transaction. For political obligation to verify he needed to demonstrate that the requirement to obey be the one and only way to cooperate and repay fairly, or exclude all other possible forms of cooperation as morally impermissible: there is a gap between “they have to cooperate” and “they have to cooperate by obeying” that nothing in his account clearly covers. Rejecting alternatives to obedience as proper forms of fair reciprocation is a possible and probable instance of moral wounding, therefore.

Throughout his account, Klosko demonstrates a serious proclivity towards assuming. Besides presuming indispensability and obedience to be the only manifestation of a fair repayment, Klosko also adopts the basic one of cooperation.

¹³⁸ Jiafeng Zhu also notices this gap. J. Zhu, “Fairness, Political Obligation, and the Justificatory Gap”, *Journal of Moral Philosophy*, Vol.12, 2015, pp. 290-312.

¹³⁹ Patrick Durning makes some similar claims. He believes Klosko’s statements have to be shown to hold by performing these demonstrations: that citizens obey the law because they know that is what the rule of cooperation demands of them to do; that citizens profit from other citizens obeying the law as a manifestation of the rule of cooperation; that the world in which people obey the law as the requirement of the rule of cooperation is superior to worlds in which they do not obey the law but still act in morally permissible manners; and finally, what I have in mind, that fairness *is* obedience. P. Durning, “Two Problems with Deriving a Duty to Obey from the Principle of Fairness”, *Public Affairs Quarterly*, Vol. 17, No. 4, 2003, pp. 253-264.

On this issue Simmons rearticulates his beliefs that modern political communities exhibit no signs of a “clear consciousness of cooperation”, and that presumptive goods are, as a rule, provided throughout “vertical” state structures (governmental agencies), not through public collaboration,¹⁴⁰ meaning citizens perceive these benefits as resulting neither from cooperating with fellow citizens nor with the government.¹⁴¹ Although I have already expressed broad agreement with the significant doubts Simmons has about states being cooperative enterprises in the discussion on Rawls, I did not find that concern exceptionally bothersome when status would be the consequence of an act of acceptance. Put otherwise, I did not consider the assumption of cooperation nauseating in a context that allowed will to function as the genuine ground of obligation. The problem with Klosko’s account is that he does not benefit from voluntarism and this assumption of the state being a cooperative enterprise is juxtaposed to the one of indispensability and held to be justification enough for doing away with freedom of choice. This is awkward for an account that presupposes no fully knowingly, deliberately performed, membership-acquiring acts; no need to acknowledge or even recognize the state as a cooperative scheme; not much chance to avoid reception of goods and therefore incorporation; a reverse burden proof that allows little space for opting out of cooperation/ disproving receipt; and even permits external recognition of receipt to be confirmation of it sufficient to generate a requirement to obey under the rule of cooperation. Separate from one another the assumptions of cooperation and indispensability may not be intrinsically awkward. When taken together, however, and packaged into an account that already impermissibly assumes the content of the rule of cooperation to be obedience, and DPGs able to create additional duties of obedience, there are just one too many unsubstantiated assumptions. Klosko seems to operate on a belief that his most important presumption – indispensability – and his most basic one – cooperation – whitewash all others and each other; but one can only take an argument so far when they are not heuristic devices. Klosko assumes much, so much that his argument

¹⁴⁰ Simmons, “The Anarchist Position: A Reply to Klosko and Senor”, p. 273. See also Simmons, “Fair Play and Political Obligations: Twenty Years Later”, p. 39.

¹⁴¹ Gans disagrees with this objection: he argues against it by claiming that people find the state and the law useful. The state being useful is not, however, obviously synonymous with people perceiving public goods as resulting from cooperation. There is a degree of separation between the two that Gans does not perceive. See C. Gans, *Philosophical Anarchism*, Cambridge University Press, Cambridge, 1992, pp. 61-62.

pushes on the outer limits of ~~€7~~conformity. And the list of assumptions does not end here.

Simmons' last concern expressed at this stage lies with Klosko's readiness to "assume the presence of an obligation, rather than the presence of a liberty" whenever there are no obvious signs of unfairness or cost/worth discrepancies. He think this is particularly visible in the case of schemes providing DPGs in addition to NEPGs, when Klosko equates "still [being] obligated" for the NEPGs, with "having new obligations" for the DPGs which have been added onto the enterprise. Simmons is of the opinion that, whenever the scheme decides to add DPGs, they should do so "at their own risk" – provide them free of charge or render them excludable – without imposing their costs on people who, by definition, do not regard them as indispensable.¹⁴² This objection covers two issues. First, the problem of DPGs: the way in which Klosko construes them and links them to political obligation undoubtedly has some dubious implications. By allowing schemes to impose additional obligations corresponding to the added DPGs a danger is created that citizens will be brought to the very limit of marginal utility; if DPGs are continuously added to a scheme there will come a point when some might find themselves crumbling under the weight of their duties. To protect citizens from this Klosko made a mention that DPGs should only be added through fair and democratic methods. Nevertheless, these methods are not in place now and it is implausible to believe that they will be installed later: mechanisms allowing citizens to tell states which specific DPGs they want to be provided seem rather farfetched, especially when considering the practical and intellectual obstacles entailed. Moreover, his argument for DPGs creating obligations is purely indirect. When stripped to its barest form it comes down to us having a duty to support their provision because they are attached – through simple processes of addition (that are not actually in place) – to an entirely different category of benefits that Klosko has "good reasons" to deem important to us. There were already issues with this line of thinking when Klosko liberally assumed the indispensability of NEPGs; now he marshals obligation goods dispensable by definition without even having the ability to rest it on a concern with acceptable life standards.¹⁴³ And while I, unlike Simmons, do not begrudge him his presupposition in

¹⁴²Simmons, "The Anarchist Position: A Reply to Klosko and Senor", p. 274.

¹⁴³ In his original article Klosko stated that discretionary public goods are not indispensable to the good life. In *The Principle of Fairness and Political Obligation*, however, he alters his position to claim that

the first case, extending it even further is the sort of exaggeration that reeks of paternalism and encourages conclusions that ~~C07not too much duty~~ fails to meet because justification imposes less than the author believed it would.

Secondly, as a general point of criticism about the practice of his account, Klosko is exceptionally cheap with exit and non-participation options awarded to citizens, his justification being one in which citizens are left with virtually only one option – to contribute to a scheme. Although theoretically they have a chance to escape obligation if they manage to prove that (a) they do not need the benefits, (b) profit from the scheme, or (c) that the benefits are too costly,¹⁴⁴ throughout his work, Klosko identifies no methods through which an individual could actually perform these demonstrations (probably because there are none). In practical terms, this equates to people having no concrete window for reasonable disobedience. This is awkward: a proper account of political obligation is one that makes the moral requirement to obey the law hard to renounce but not inescapable. Klosko's tying the justified non-performance of obligations to three nigh-on-impossible demonstrations, is thus worrisome – it makes the state practically Hobbesian, with reasonable disobedience more of a very slim theoretical possibility than something that could occur in the real world. An argument can be made that his justification falls foul of ~~C3reasonable access to disobedience~~ because of ~~C07not too much duty~~.

As far as objections go, however, this last opinion is correct but of limited significance compared to the other major issue with Klosko's account – his failure to acknowledge and make provisions for alternative supply. Alternative supply is a counterpoint to Klosko's claim that the delivery of indispensable goods is something that no construction other than the state does or could do.¹⁴⁵ Klosko presents the state as the sole source of valuable and valued services and seems actively to forbid people

these goods can have a certain "practical indispensability" because they assist in the provision of presumptive benefits. We are thus left unsure how important – or unimportant – these goods actually are. See G. Klosko, *The Principle of Fairness and Political Obligation*, p. 87. How this cumulative importance relates to obligation is something of a mystery, however. In "Presumptive Benefit, Fairness and Political Obligation", Klosko had told us that DPGs cannot create obligations by themselves, but only when added onto schemes already providing NEPGs; in his 1992 book he changes his mind and writes that "because discretionary public goods are of less immediate value than presumptive goods, the obligations they generate will be weaker", leaving us with the impression that DPGs can actually produce some duties. See Klosko, *The Principle of Fairness and Political Obligation*, p. 99.

¹⁴⁴*Ibid.*, p. 48-49.

¹⁴⁵ Simmons discovers this issue much later. A.J. Simmons, *On the Edge of Anarchy*, Princeton University Press, Princeton, 1993, pp. 258-259.

from trying to secure these things through their own devices;¹⁴⁶ he makes no allowance for those who want to avoid using public resources, for any reasons. Klosko's state, therefore, discourages alternative supply and its pursuit and unilaterally decides on both the subjects and objects of basically non-optional benefaction. In *On The Edge of Anarchy* Simmons writes that "many public goods supplied by the state can be provided by alternative, private means" and that the state should accommodate the individual "who prefers to try to provide the good privately".¹⁴⁷ In time, this last contention has become the main charge against Klosko's principle, and in his article "The Natural Basis of Political Obligation" together with large portions of his 2004 book *Political Obligations* Klosko endeavours to respond.

To demonstrate that alternative supply is not a real obstacle for his principle, in *Political Obligations*, Klosko marshals two sub-arguments: that the state is necessary (chapter 1), and that no non-state entities (NSEs) can be plausibly thought to be capable of assuming the state's role in the provision of open public goods (chapter 2).¹⁴⁸ He begins his demonstration by providing a new definition of "acceptable life":

"... by acceptable lives I mean lives in modern industrial societies, as we know them. These societies are relatively safe, have functioning economies, and allow travel and a wide range of occupations, activities and modes of life".¹⁴⁹

Then, he states that "individuals could not provide [indispensable benefits] themselves and so must rely on the state"¹⁵⁰ and moves on to list all the goods states deliver to us in an attempt to show that they will always be more successful in the provision than any NSEs could ever be.¹⁵¹ Two problems can be detected even at this early stage. To begin with his definition of acceptability is both Western world centric, therefore severely reducing the possibility that his principle of fairness may

¹⁴⁶Klosko, *Political Obligation and the Principle of Fairness*, p. 40.

¹⁴⁷ Simmons, *On the Edge of Anarchy*, p. 258.

¹⁴⁸G. Klosko, *Political Obligations*, Oxford University Press, Oxford, 2005, p. 64.

¹⁴⁹Klosko, *Political Obligations*, p. 20.

¹⁵⁰*Ibid.*, p. 21.

¹⁵¹*Ibid.*, pp. 22-41.

be used to justify political obligation in non-Western societies,¹⁵² and yet again quite paternalistic, a recurrent theme throughout his work. It begs the obvious question whether it would not be better to assume that the standards of acceptability are not imposed from above (which may be an immensely heavy task, something that Klosko does not consider), by scholars and state agencies, but rather determined personally, on an individual basis. Holding acceptability to be uniform runs a heavy risk of offending not only personal sensibilities, but freedom of choice as well [which Klosko tries so hard to circumvent]. In addition, insofar as this assumption is married to one that people will invariably not be able to provide and obtain on their own, this issue is not only one of common sense but a moral one, at least insofar as they are banned on a simple presumption of inability from something that it is not immoral to attempt to do.

Secondly, an opponent of Klosko does not automatically question, as the philosopher presumes, the need for the state, or the idea that it is the provider and facilitator of many important things including order, coordination and an environment in which we can exercise our rights and freedoms, practise justice, pursue happiness and so on. Nor does she [the critic] deny that, as far as non-excludable public goods are concerned, the state is typically the best provider (because of its large resources – financial and otherwise – and its ability to regulate and coordinate). What she rejects, however, is this apparent state-held right of exclusivity that Klosko puts forward based on the idea that no non-state agent is going to deliver goods as efficiently as the state: the state may truly be necessary in the senses that without it life would be nasty, brutish and short; and the goods it provides may well be indispensable to the good life, but that does not necessarily mean that the state is indispensable to their provision. Just as it is not at all obvious that citizens can only obtain the goods they need from the state, it is not obvious that they are better off receiving them from it than from some another source. Alternative supply is not impossible and it is not inescapably an inferior option to state benefaction. In these conditions, instead of assuming, Klosko should have focused on determining whether the lack of choice is mandatory, not on arguing for the general usefulness of a state that none who took issue with his principle denied.

¹⁵²A fact which Klosko acknowledges: “whether people in such societies have political obligations and what there are or would be like are questions I will not explore”. *Ibid.*, p 37.

Klosko instead claims that the provision of NEPGs requires the cooperation of large numbers of people organized in complex ways by agencies capable of ensuring compliance,¹⁵³ and that NSEs will not be able to achieve this consequently failing to provide. This becomes the core of his entire argument against alternative supply. Thus, even though he admits that “it would seem unfair not to allow [people] a reasonable opportunity to set up alternative mechanisms of provision”¹⁵⁴ and that “when a given alternative mechanism is able to satisfy the plausibility requirement it would seem unreasonable not to allow [people] to pursue some benefit through it rather than the state”, he remains firmly convinced that the necessary mechanisms will never translate into reality.¹⁵⁵ Nevertheless, in spite of his insistence that an NSEs-led alternative supply is implausible, his text reveals at least a subconscious awareness that it may not be entirely impossible: after announcing that NSEs cannot organize well enough to distribute NEPGs and the afferent DPGs, he writes that, even if it turned out to be in fact possible for them to organize, these corporations would most likely become a dangerous monopoly-owning consortium, guilty of collusion and ultimately of exclusion, and therefore undesirable.¹⁵⁶

Klosko’s claims are weak. Assuming that there are no material structures delivering indispensable goods, Klosko should have made more of an effort to imagine a functioning NSE.¹⁵⁷ Postulating a large-scale enterprise, patterned on the model of successful state and privately owned big businesses, with their operations vertically controlled in a pyramid of management, and distributing goods alongside the state is not difficult; the universe in which such a construction could exist is not necessarily not our own. But NSEs delivering indispensable goods alongside the state is problematic for his general claims about obligation. If such constructions existed and functioned then citizens would have to be allowed to choose, unless it could be shown that NSEs and their operations are morally objectionable in the senses that they are doing something impermissible. Otherwise they [the citizens] would be morally harmed; and so would they be if the state insisted on it remaining the sole provider. In such a scenario, in order to avoid becoming an aggressor, the state would have to allow for alternative supply. The consequences for the requirement of cooperation

¹⁵³ Klosko, *Political Obligations*, p. 24.

¹⁵⁴ *Ibid.*, p. 63.

¹⁵⁵ *Ibid.*, p. 65.

¹⁵⁶ *Ibid.*, pp. 31-32.

¹⁵⁷ An arguably wide-of-the-mark assumption, considering the private health, education or telecommunications systems, for example, which outperform state-owned ones.

would be negative, however; states would not be justifiably entitled to expect fair reciprocation – whatever that may mean – for goods citizens do not take from it, which would render the content of cooperation patchy at best.

As for his certainty that the NSEs would degenerate and cause harm, this is yet another unfounded assumption. These NSEs would be distributing goods *alongside* – as emphasized – not instead of the state; and while Klosko presumes that NSEs will tend towards supplanting it (either by design or accident) they could just as well function properly *in parallel* to the state, with individuals opting for the provider they find most efficient. Nothing in the scenario I propose prevents the state from maintaining regulatory power. The state is not a mere purveyor of goods – it holds the monopoly of violence and coercion, more or less legitimately, and has the authority to employ the law in a fashion that protects and bolsters citizen-interests. The functioning of NSEs would not entail the disappearance of the state and its agencies nor would it affect, in any radical way, its roles or abilities. In these circumstances, NSEs would have to function between the existing legal parameters and conform to state directives, like any other business in the market. In addition, even if this supposed consortium were to malfunction, citizens would always have the option to fall back on state-supplied goods, hence never being in danger of having to do without indispensable goods or being left at the “whim” of some enterprise. The only obvious victim in this picture is therefore the already maximally conjectural political obligation, for which justification weakens even further; ~~CO8accounting-alternative-supply~~ is not met.

Klosko concludes on alternative supply by writing that the final burden of proof lies with his *anti-state* opponents who have to prove either that citizens “do not receive public goods” or, better yet, conclusively establish that NSEs have the capacity to take over the delivery of NEPGs/DPGs completely.¹⁵⁸ Because his arguments against alternative supply are insufficiently convincing, the burden of proof is reversed, however. It is up to him to show that NSEs are truly impractical or that the overlapping state and private supply of indispensable goods would necessarily create blockages, incongruities of distribution or deprivations; or, if he accepts the possibility of alternative supply, account for the effects on his account, particularly on his claims of indispensability and cooperation and, most importantly, what this

¹⁵⁸ Klosko, *Political Obligations*, p. 70.

differentiation in sourcing would have on the generality of political obligation (as well as its permanence and coherence).

Klosko, however, will not. At the end of *Political Obligations* he embraces a multiple principle account that is synonymous with a theoretical capitulation. His principle of fairness cannot sustain political obligation.

Conclusion

Classic consent theory has revealed itself through this examination to be a paradigm that struggles with reality beyond what could be considered tolerable. Although purely theoretically there is not much on which it can be faulted – it meets almost all the criteria set in the methodology and allows political obligation to retain all features assigned to it while providing it with a normatively sufficient source – its inconsistency with concrete political experience bars it from generality in a definitive manner: the infinitesimal number of body politic members who could be said to have expressly or tacitly consented to obey prevents political obligation from even being a generic duty for actual citizens. This failure to achieve ~~€1generality~~ because of struggles with ~~€7conformity~~ is consent's original structural fault.

Modern consent theory's structural flaws arise from its inability to compensate for what the concept lost during efforts of alteration and reinterpretation designed to make it more compatible with political realities. At its core, this flaw is an issue of degeneration that depletes the normative force of the chosen ground resulting in ~~€01Asufficient normative strength~~ being forfeited. For tacit consent as residence and voting it equated to losing sight of what counts as a genuine choice situation in which consent could work its normative magic, and that citizens can be found to have approved when exercising their statutory rights. In both cases, political obligation failed to ensue, in the first one because attempts were made to discover it in a scenario moral theory disallows considering sufficiently free to count as one in which agents are presented with genuine optionality, while in the second because of a confusion between selecting those in authority and consenting to be under the power of authority. While the second bears the mark of a logical error, the first is indicative of the practice to put distance between consent and the conditions of full knowledge and intentionality that would become the hallmark of hypothetical consent theory.

In its hypothetical embodiment, consent theory is at its most unsound, and (CO1B) degeneration at its most noticeable. Hypothetical consent paradigms fail across the board to distinguish themselves in any theoretically relevant manner from Razian or Kantian inspired theses of authority or from natural duty accounts. The reason for this is that, ultimately, they employ a consent that has been all but completely stripped of its core features and has consequently become something that is not only unable to sustain obligation on itself but obligation at all. Deterioration is so complete that, pretences aside, consent plays no genuine normative part in these accounts. Mutilation has proven to have no positive consequences, a theory originally structurally flawed only in the senses that it did not reflect reality with any measure of accuracy becoming a theory that cannot escape collapse into other types of accounts, whose designated ground is effectively useless and requiring of paradigm-altering supplementations and that, in its later instantiations, is consensual only in the grammatical mood of its proponents. Modern consent theory's structural fault is therefore an erosion for which there cannot be any reparation: consent not free, knowledgeable and deliberate is consent that cannot sustain obligation. We are thus decisively not only at the end of these consent paradigms but at the end of consent theory altogether: consent is non-existent and cannot be reinterpreted or be "made up for" by alternative means. C1generality, C7conformity and CO1A and CO1B strength-non-degeneration cannot all be satisfied in a consent, or *faux* consent, logic.

The principle of fairness is similarly a paradigm that moves from a flaw of inconsistency [with reality once more] to a more serious departure from the required criteria. Unlike consent, the principle of fairness is at its strongest in its last form, divested from any vestige of intentionality and will. Although a number of criticisms can be marshalled against Klosko's account, only two issues seriously matter and both have destructive force: alternative supply (~~CO8accounting-alternative supply~~), which is undeniable and which wounds his claims to ~~C1generality~~ and ~~C2universality~~, insofar as it renders the alleged requirement to obey intermittent at both individual and collective levels, and the gap between establishing that beneficiaries have a duty of fair reciprocation and conclusively establishing that fair repayment necessarily takes the form of obedience (the issue of content of the rule of cooperation), which obliterates claims to having vindicated political obligation because ~~CO4precise content~~ is not met. Klosko believes that what citizens owe horizontally to one another takes the form of compliance with the demands of law. This belief, however, rests on two

assumptions that are not vindicated. First, in order for it to be fair to reciprocate benefiting had to be shown to be clearly the result of cooperation, and not just any cooperation but cooperation in the guise of submission to law; secondly, that fair cooperation can only take the form of submission to the law. Moral discourse insists that it is unfair not to repay those whose actions have led to benefiting, but, for considerations of fairness to actually arise, the right holders have to have genuinely generated the gains. Even if Klosko conclusively demonstrated this, however, or we agree to assume with him that all citizens fairly owe, he has no strong argument against alternative manifestations of cooperation: strange as it may seem, even if he had demonstrated that benefiting is directly rooted in the compliance of others he would still need to exclude forms of repayment other than identical behaviours of obedience towards the law. Klosko's rule of cooperation is therefore doubly problematic, less so in the sense that considerations of fairness may not necessarily be the appropriate one, more so because its content is imprecise.

The structural flaw in the principle of fairness paradigm is therefore primarily a flaw of imprecise content, which, in the absence of contract and will, there can be no making up for, it being impossible to exclude literally all other forms of reciprocation as morally impermissible. As such, the conclusion to be reached about Klosko's perfected principle of fairness is that it imposes, but not something that is obviously and necessarily obedience towards an authority in possession of a right against. Because of this, principle of fairness paradigms devoid of intent necessarily fail; aside of all other issues, ~~CO4precise content~~ and CO8accounting-alternative-supply ensures it.

Thus, transactionalism necessarily collapses. These failures of consent theory and principle of fairness pushed the thought on political obligation in a new direction. Voluntarism and transactionalism were abandoned in favour of a non-voluntarism that, on the side of political obligation, took the form of associative theories attempting to explain the duty to obey on the basis of community membership. This move was considered to be the next best strategy: the aim was naturally still to show political obligation to be a special relationship, but rather than consequential to a wilful act or exchange of benefits, as instead part and parcel of a type of duty group members – including those with non-voluntarily acquired memberships – have towards one another. These theories subsequently marshalled the contention (broadly speaking) that particularized obligation flows from birth, growth and life in one's own

political group, from the role of the citizen, and from a connection with fellow members that is not dissimilar to the one between family members or friends. These are the accounts I address, and reject, in chapter III as paradigms that choose an inadequately solid ground for an obligation as heavy and permanent as political obligation, that require normative supplementation, and that ultimately make for uninteresting and unnecessarily complicated alternatives to natural duty accounts.

Chapter III: Non-voluntary Accounts: Associative Political Obligations

In the previous chapter I have explained why voluntarism cannot account for the moral requirement to obey the law. Scholarly efforts to move consent along from the theoretically impeccable but impractical express consent to a form more reconciled with day-by-day political realities implied a lowering of the bar for intentionality that eventually amounted to disfigurement [of the concept and its features] and rendered consent unable to produce or sustain any kind of duty; as it became further and further removed from will consent theory eroded to the point of complete degeneration. I have also shown that the principle of fairness had to suffer similar modifications in order to make up for its earlier structural fault of inconsistency with reality. Klosko's effort to compensate for loss of will was compelling, but in the end his account collapsed under the weight of too many assumptions, the most offensive of which was the one negating alternative supply, as well as under a structural fault of imprecise content that did not establish obedience as the conclusive content of a duty of fair reciprocation towards fellow citizens involved in the production of benefits. I concluded that both failed and that both will continue to fail, precluded from success by issues arising out of their choice to divest from will for which, paradoxically, will would be the only solution.

The foundering of these accounts of political obligation under the weight of criticisms entailed the end of hegemony for transactional justifications and cleared the way for the advent of non-voluntary ones, of which associative theories are most representative. Though associative narratives in the 1980's works of communitarian scholars such as Alasdair MacIntyre (*After Virtue*) or Michael Sandel (*Liberalism and the Limits of Justice*) or of legal philosopher Dworkin attracted considerable attention, it was only a decade later that they became the dominant school of thought on the issue, once the principle of fairness account began to unravel.

Scholars advocating associativism have had quite different purposes. Communitarians, for example, try to discourage the kind of blanket moral judgements universalism prompts and to validate communities as identify shapers and independent producers of rules and normativity; [some] feminists, rejecting liberalism

as conducive to the well-being of the most vulnerable groups in society, use associativism as a tool for the promotion of a more inclusive point of view on humanity that does not wilfully ignore history, roles, associations or contexts;¹⁵⁹ Dworkin tries to improve his theory of law as interpretation by completing it with a theory of obligation; Tamir is a scholar of nationalism who has issue with liberalism because of its self-imposed blindness to the necessity of cultural *embeddedness*; Gilbert starts as a sociologist concerned with the mechanics of group formation and the behaviours and attitudes of members within it; only Horton is a bona fide scholar of political obligation dealing with the narrow task of justification. Still, in spite of this diversity in academic purpose, all of these scholars see associativism as a potential solution to their problems with authority and obligation. Thus, their articulation of the associative theory reveals considerably more commonalities than discrepancies.

Broadly speaking, the architecture of any associative account rests on four pillars: a belief that political obligation can and is non-voluntarily acquired; a practice of comparing membership in a group state to membership in families, on the idea that both are capable of imposing obligations on parties even if neither is voluntarily entered into (this idea evolved from a claim of similarity to an opinion that both non-voluntary practices have similar normative powers); an argument for particularity that rests on the idea that we owe political obligation to the group we were born in because we were born and socialized within it;¹⁶⁰ and a conviction that local practices are capable of generating moral obligations and determine their contents independently of higher order moral principles and their dictates.

These tenets reveal associative obligations to be moral requirements not in any way linked to intentional acts but, at the same time, owed not to anyone *qua* human but rather to the specific members of the specific groups to which the bearers of obligation belong. Thus, they are neither voluntary nor unconditional:¹⁶¹ Bass van der Vossen argues them to be special obligations pertaining to special relationships that hold no value, substance or intelligible meaning in their absence. The task of

¹⁵⁹ Significantly, Iris Marion Young, Susan Moller Okin and Nancy Hirschmann see some of the merits of communitarianism.

¹⁶⁰ A.J. Simmons, "Associative Political Obligations", A.J. Simmons, *Justification and Legitimacy*, Cambridge University Press, Cambridge, 2001, pp. 65-93, p. 70.

¹⁶¹ B. van der Vossen, "Associative Political Obligations", *Philosophy Compass*, 2011, pp. 477-487, pp. 477-478. Also see B. van der Vossen, "Associative Political Obligations: Their Potential", *Philosophy Compass*, 2011, pp. 488-496.

associative theorists of political obligation is henceforth to demonstrate that the moral requirement to obey the law of one's state is one of these special obligations attached to the special role of citizen.

In this chapter I address and rebuff attempts to justify the moral requirement to obey on this associative argument.¹⁶² To begin with I reject the minor opinion that was the conceptual argument as unintelligible and un-academic in its refusal to allow interrogations of the duty to obey the law. Then, in turn, I first reject Dworkin's account as paradigmatic of associativism's readiness to ground obligation in precarious grounds which cannot sustain the normative burden on their own. Secondly, I argue that Gilbert's complicated construction fails for reasons both typical (reliance on attachments, beliefs about roles and the self-justifying character of subsumed duties) and atypical (insistence on a process of recognition with consequences that are not obviously political obligation and a permanent brushing with transactionalism) of associative justifications. Thirdly, I engage with communitarian (and associativists) claims that obedience to the law is a consequence of the important part the role plays in identity formation, and of the ability of practices to create duties for locals independently of overarching moral principles; I argue the first to be false and the second to be an overstatement that only serves to vindicate criticisms that associativism struggles significantly not to degenerate into accounts from natural duties. Fourthly, I examine John Horton's – associativism's staunchest defendant – account and find that, even though he manages to avoid some of the classic trappings of the paradigm (degeneration), he ultimately miscarries, plagued by other habitual faults.¹⁶³ I conclude that associativism is a flawed paradigm of political obligation that does not function as a proper explanation for the requirement to obey.

The Conceptual Argument

One of the first exercises in delivering this sort of account for the moral requirement to obey is “the conceptual argument”. This proto-associative paradigm

¹⁶² Whether there is merit to discovering associative obligations outside of our sphere of preoccupations does not concern me.

¹⁶³ In doing these I observe the determinant role the Simmons-Horton debate has had on the development of the associative justification of the moral requirement to obey and insert myself into it.

gained its fullest expression in the 1960's work of Thomas McPherson, which owed something to Wittgenstein.¹⁶⁴

“That social man has obligations is therefore not an empirical fact (which might have been otherwise) that calls for an explanation or “justification”. That social man has obligations is an analytic, not a synthetic proposition..... “Why should I (a member) accept the rules of the club?” is an absurd question. Accepting the rules is part of what it means to be a member. Similarly, “Why should I obey the government?” is an absurd question. We have not understood what it means to be a member of a political society if we suppose that political obligation is something we might not have had and that therefore needs to be justified.”¹⁶⁵

It was immediately deemed controversial and it is not hard to see why – its core contention is that demands for justifications of obedience are a clear indication of a failure to understand what citizenship *means*. McPherson's words are tantamount to a claim that doubts about the existence of a requirement to obey are best-case scenario signs of ignorance, if not downright irrationality. Theorists of political obligation, including most modern associativists, find the argument unsurprisingly unconvincing. The main charge against it is that, if the compulsory nature of obedience were the self-evident truth the conceptual arguments holds it to be, then questions about the obligativity of law abidance would be unintelligible.¹⁶⁶ They are not. And if having hesitations and misgivings about the demands laws and states make of us is irrational then absurdity is pandemic; most citizens are, at various points in their lives, unconvinced about the prerequisite of obedience. And if these queries are shelved they are not so because of immediate recollections about what it *means* to be a member of a political community, but because of other reasons – disinterest, resignation, or the ever-motivating fear of coercion and repercussion. Moreover, aside from this, if there is one [allegedly] associative relationship whose meanings and attached obligations need to be spelled out, it is the political one. Given that members

¹⁶⁴ Even earlier, in 1951, Margaret MacDonald was failing to see the logic, but not the potentially nefarious consequences of questions about the mandatory nature of obedience. See M. Macdonald, “The Language of Political Theory”, A.G.N. Flew (ed.) *Logic and Language*, Basil Blackwell, Oxford, 1951, pp. 184-185.

¹⁶⁵ T. McPherson, *Political Obligation*, Routledge and Kegan Paul, London, 1967, pp. 64-65.

¹⁶⁶ Simmons, “Associative Political Obligations”, p. 73.

of political communities have been “dropped” into this association at birth, are strangers to one another, have no great, obvious communal purposes and potentially very little in common, people may need some theoretical guidance to supplement the gradually obtained practical experience of membership; they may need a little coaxing that membership is meaningless without obedience, that non-performance equates to dereliction of duty, even if the role is non-voluntarily assumed, that disobedience or asking for justifications is a sign of intellectual and logical (and perhaps moral, as well) failure.¹⁶⁷

Defenders of the conceptual argument could nevertheless not accept this. They were precluded by a readiness to contend that membership in the state is identical to membership in any club, and by an opinion that there is a metaphysical “meaning of political membership” that is accessible to citizens without illumination, or revelation or any kind of explanation simply in virtue of their being born not as gentle savages, but as legal members of a state. There is ample room to argue that this claim is unconvincing. Is not the more modest contention that, whatever meaning political membership may hold, it is personal, determined individually, through day-by-day practices, behaviours and attitudes, and that this unique, self-imposed meaning may not necessarily presuppose a firm or correct notion of political obligations? And how likely is it that political membership could hold the same significance for everyone across the socio-political-cultural spectrum? It is very hard to isolate the meaning the conceptual argument has in mind and to believe that there are accessible and precise methods to tap into it. This, therefore, can be taken to be a clear failure to achieve ~~C7~~conformity.

These are valid worries. The conceptual argument’s failure to acknowledge them is nowhere near as poisonous to the theory as the grave mistake its advocates make when they dismiss demands for justification as logical slip-ups, however. Probing the morality of the obligations supposedly attached to membership is not synonymous to questioning the value, significance or ethical character of the role itself (in any group) nor, crucially, denying that obligation is “constitutive” of them.¹⁶⁸ One can admit that certain associative relationships have massive non-

¹⁶⁷ Although most likely they would need to be informed that they are in an associative relationship with the other members of their political community.

¹⁶⁸ Scheffler writes: “non-reductionists are impressed by the fact that we often cite our relationships to people rather than particular interactions with them... as the source of our special responsibilities”. S. Scheffler, *Boundaries and Allegiance*, Oxford University Press, Oxford, 2001, p. 100.

instrumental value and can admit that obligations are part and parcel of these roles; but that does not entail that bearers of obligation are always “morally justified” or doing “good” when discharging these duties. There are conceivable instances in which non-performance could be argued to be morally sound without implicitly shattering the relationship and the role. This is especially evident when the role in question is the one of citizen: one could disobey without as much as offending fairness, let alone committing some great trespass against morality or, *ad maximum*, dissolving membership.¹⁶⁹ The radical claims of the conceptual argument simply do not hold.

This form of primitive associativism had no lasting negative effects on the usage or popularity of the assumption that the roles with which we identify presuppose incumbent obligations. It could not have had. Hegel had given it clout more than a century earlier,¹⁷⁰ and modern communitarians were just about to start embracing it wholeheartedly, come Rawls’ 1971 *A Theory of Justice*, which offended greatly with its individualism, its lack of interest in historical and cultural contexts when determining the principles of justice, and its penchant for moral appraisals. Twenty years after McPherson’s conceptual argument, however, it would not be communitarians that would write the most compelling associative justification of political obligation based on roles, but legal philosopher Dworkin. In the next section I examine his associative account and discover it to miss its justificatory goal for reasons that time and again will poison the well for associativists – inconsistency with reality and appeals to other principles that negate their claims to a single ground of obligation, and obviate its parasitism, alongside the fact that associativism is a paradigm replaceable with more direct accounts from natural duties.

Ronald Dworkin

In *Law’s Empire* Dworkin articulates his own associative theory of political obligation. This justification is part of a larger interpretative opinion on the law and has as its main purpose as establishing, beyond reasonable doubt, the truthfulness of legal propositions – in simpler terms, that we have to do what our laws require

¹⁶⁹ David Lefkowitz expresses some of the same concerns in his doctoral thesis “A Moral Contractualist Defense of Political Obligation”, defended in 2003 at the University of Maryland at College Park. See, chapter 3, p. 97.

¹⁷⁰ In the *Preface to the Philosophy of Right*.

because they are the laws of our state.¹⁷¹ Dworkin's account is grounded in observations the legal scholars makes about smaller human practices such as family and friendships. Without going the habitual route that equates family to political membership Dworkin holds that, just as these practices can impose obligations on members on non-voluntary grounds (no contracts have been signed, no negotiations have occurred, no expressions of will have been made), other forms of community – including the state – can burden participants with obligations.¹⁷² The moral justification for these obligations can be discovered through a process of *interpretation* of the practice itself; an examination of relationships and those involved in them that should obviate a set of behaviours, beliefs, attitudes, governing principles.

Dworkin's argument boils down to this deceptively simple assertion: membership in “true communities” characterized by the value of integrity imposes the associative obligation of obedience. All is definitely not as uncomplicated as it seems, however. Even though Dworkin obviously judges social practices able to impose clear role obligations on members, he qualifies his position by arguing that only *true communities* yield genuine obligations.¹⁷³ These communities cannot be suspected of having defined and assigned obligations through manipulation or indoctrination (“rituals” or “conventions”) because interpretation reveals them to exhibit four distinctive, fundamental characteristics:¹⁷⁴

1. The obligations they assign are “special, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it”.¹⁷⁵
2. The obligations they assign are personal in the sense that they are owed by each community member to each community member and not to the group as a whole.¹⁷⁶
3. The obligations they assign must be seen as “flowing from a more general responsibility each has of concern for the well-being of others in the group” to the point “that discrete obligations that arise only under special circumstances

¹⁷¹ S. Perry, “Associative Obligations and the Obligation to Obey the Law”, S. Herschovitz, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, Oxford University Press, Oxford, pp. 2-3 (printed).

¹⁷² R. Dworkin, *Law's Empire*, Harvard University Press, Cambridge, 1986, p. 197.

¹⁷³ Dworkin, *Law's Empire*, pp. 195-196.

¹⁷⁴ *Ibid.*, p. 199.

¹⁷⁵ *Ibid.*, p. 199.

¹⁷⁶ *Ibid.*, p. 199.

[must be treated]as derivative from and expressing a more general responsibility active throughout the association in different ways”.¹⁷⁷

4. Members are aware that the groups to which they belong show equal concern for them in the sense that “roles and rules are equally in the interest of all, that no one’s life is more important than anyone else’s”.¹⁷⁸

The third and, especially, the fourth governing conditions obviate, to Dworkin’s mind, that the only communities that could be considered *true* in his desired sense are those that are “models of principles”.¹⁷⁹ These communities are societies in which a collective desire to be ruled by principles of justice, fairness, the rule of law, due process, etc., can be shown to exist, in which members accept that they have both rights and obligations, in which the spelling out of neither rights/obligations nor justifications is necessary. In simplest terms, true communities are communities that uphold the supreme political ideal of *integrity*. Importantly, in a way that departs from the usual associativist position that membership/roles themselves generate obligations independently of the practices’ goals, Dworkin restricts associative obligations to participants in communities that do not behave in ways or have aims that conflict with the goals of justice.¹⁸⁰ Hence, the action and principles of a community must not run against the general demands of justice.

The immediately evident issue with Dworkin’s account is that not even the most paradigmatic examples of associative relationships we can think of meet the prerequisites he sets, most clearly conditions (3) and (4);¹⁸¹ there is always some degree of partiality towards certain fellow members (even parents have favourite children) and/or some measure of disconnectedness from them to negate them; and the larger the group studied the clearer this issue becomes, probably to the point that straight-faced claims that political communities meet the latter conditions would cause great disbelief even amongst the less cynical; this clearly strains ~~C7~~conformity.

Independently of this, however, we cannot be sure that the conditions Dworkin established above are genuinely more than beliefs. The declared, self-imposed goal of Dworkin’s work was to discredit the positivist rule-of-recognition as a proper

¹⁷⁷ *Ibid.*, p. 200.

¹⁷⁸ *Ibid.*, p. 201.

¹⁷⁹ *Ibid.*, p. 211.

¹⁸⁰ *Ibid.*, p. 204.

¹⁸¹ Perry, “Associative Obligations and the Obligation to Obey the Law”, p. 18.

foundation for a legal system (on the basis that practices, traditions, conventions, *beliefs* are insufficient).¹⁸² Yet his account rests on what looks very much like a contention that there are true communities *believed* by their members to be models of principles based on equal concern and integrity, *believed* to meet the four conditions. Consequently, Denise Reaume makes a fine argument in favour of Dworkin falling into the same trap as positivists. Perry, Knowles and others attempt to rescue him by reminding that he thought the four conditions to be the routine interpretations of a group, not “psychological properties of some fixed number of actual members”.¹⁸³ This position seems as farfetched as his claims above about the features of true associative communities: can interpretation be practised without it being in any way affected by the interpreter’s belief systems, by precedent, by tradition, and the likes? It strains belief, especially when taking into consideration the fact that, in spite of his vehement denial of the psychological characteristic of interpretations, Dworkin is ready to discuss the state as capable of equal concern, of a genuine desire to advance and protect every member’s wellbeing. Dworkin thus proves himself less generous in his opinions on human psychology than with claims that largely personify the state. As such, regardless of whether or not Dworkin attempts to ground political obligation in potentially confused, mistaken, mutable beliefs or in a process of interpretation that in no way can escape being determinately influenced by them, his selected sources of duty make for very unstable ground. Missed ~~€7conformity~~ therefore leads to ~~€01Asufficient normative strength.~~

This rooting has other negative implications for his account. Firstly, if equal concern is a matter of interpretation not psychology then the possibility of instability increases exponentially, in proportion with escalations in inauthenticity of concern or variability in expression. This can lead to localized variability and unpredictability, if members do not show the correct amounts of the right type of concerns at the proper times, a fact that Dworkin himself admits. Consequently, this threatens conditions (3) and (4) and therefore the very existence of a true community.¹⁸⁴ Secondly, if concern is purely a matter of interpretation, the door is opened to a host of morally objectionable results; neither North Korea nor the dictatorships of the Middle East are

¹⁸² The rule of recognition is the secondary rule of a legal system that set the criteria of legal validity (what counts as a law) and for making and applying legal rules.

¹⁸³ Dworkin, *Law’s Empire*, p. 201. Also see D. Knowles, *Political Obligation*, Routledge, 2009, p. 177 and Perry, “Associative Obligations and the Obligation to Obey the Law”, p. 20.

¹⁸⁴ At best this would entail oscillating duty.

likely to have any reservations about interpreting themselves as exhibiting equal concern and the value of integrity. It looks as though Dworkin might be ready to accept that abusive regimes could impose associative obligations on their members as long as those that perform interpretation find the four conditions to have been satisfied. But it is only an impression. Dworkin does not believe communities that practise routine violations of rights to be capable of imposing on their members a threshold level of justice that has to be met at all times. Without it, even if localized interpretations assert equal concern, no associative duties exist. The principle of justice has its superior, overriding moral status recognized.

There is a serious downside to this, however. Dworkin finds himself in a position in which he is forced to supplement his account with an appeal to justice that is not without effect on the ground of duty in as much as it prompts doubts about the authenticity of his associativist credentials and invites questions about the precise carrier of the normative load.¹⁸⁵ Dworkin insists that the ground of obligation is “membership in the true community” but the issues of equal concern and justice have all too regularly taken centre-stage. I would argue that, in Dworkin’s case, membership is not only not the ground of obligation, but not a ground at all.¹⁸⁶ His effort begins with a claim of obligation being sourced in membership yet the bulk of the argument focuses on “equal concern” and justice (which comprises integrity), group belonging and citizenship effectively mattering much less towards obedience than the communities’ exhibiting of these features. Dworkin’s account consequently reads more like a natural duty of justice – or a natural duty of justice as equal concern (something Stilz later defends in convincing fashion) – than a clear associative account. The purported ground for the moral requirement to obey – membership – is parasitic on concern and justice, both of which have more moral charge and more normative strength, including imposing duties. Furthermore, it is not that the argument from membership in true communities justifies the obligations of only a minority of people, with justice and equal concern explaining and shouldering the

¹⁸⁵ This is an insurmountable obstacle for all associative theories. Richard Dagger’s explained it best “...membership is not itself sufficient to generate an obligation: something extra must be added- an appeal to justice or to the nature of a true community- to supply what a straightforward appeal to membership lacks”.¹⁸⁵ R. Dagger, “Membership, Fair-Play and Political Obligation”, *Political Studies*, Vol. 48, 2000, pp. 104-117, p. 110. The appeals to justice associative accounts are forced to make to avoid the conclusion that people have obligations towards immoral communities render their justifications parasitic on the principle of justice. In other words, they become hard to distinguish from natural duty of justice accounts.

¹⁸⁶ Or its normative burden is minuscule.

rest; it is that it justifies the requirement of no one, the later claim from justice, manifesting as equal concern, potentially creating duties before any fact of membership ever could. The toothless argument from belonging is therefore “beaten to the punch”, obviating the account’s parasitism and degeneration before we could even mouth objections that being an action presupposed by a role is not sufficient moral justification for performance. Hence, ~~COIB-non-degeneration~~ is obviously missed.

After having encountered significant resistance to his original account of political obligation, Dworkin revisits the topic in *Justice for Hedgehogs*. Here, Dworkin argues that a particularized duty to obey exists because political communities wound the dignity of their members through coercive practices. What he means by this is that, just by going along and submitting to the coercive demands of authorities, each and every one of us negatively affecting the dignity of fellow citizens. While such coercion may seem wrong or morally objectionable, it is not; coercion is necessary for regulating social interactions between members of the political community; without it, the state would be morally defective.¹⁸⁷ In these conditions obeying the law presents itself as the solution to the problem of preserving the dignity of others: if coercion is offensive yet necessary and morally permissible then the only way to protect others is by submitting to the same set of rules they do:

“We find ourselves in associations we need and cannot avoid but whose vulnerabilities are consistent with our self-respect only if they are reciprocal-only if they include the responsibility of each, at least in principle, to accept collective decisions as obligations.”¹⁸⁸

This line of argument, though ingenious, does not help Dworkin much. There are multiple issues with it. First, there is the attempt to circumvent whatever objections there may be that particularity is not met. For typical associativist accounts particularity is not a problem: we owe what we owe to the political community in which we associate and which has contributed significantly and determinately to who we are, how we behave, etc. In one sense, Dworkin does not depart from ordinary associativism enough to assume this defence does not work for him as well. That said,

¹⁸⁷ R. Dworkin, *Justice for Hedgehogs*, Harvard University Press, Cambridge, 2011, p. 320.

¹⁸⁸ Dworkin, *Justice for Hedgehogs*, p. 321.

insofar as he increases the number of appeals he makes to moral principles and justice and dignity, he invites questions about the moral permissibility of borders, of exclusions and of restricted applicability. A first question in this direction is why the dignity of those that fall the right side of the border matters more than those outside of it; on what morally correct grounds was it decided to perform exclusions is another one; and there are other questions concerning the possibilities that communities that exhibit similar legal cultures and principles may also have some claims to our submissions, that “juster” ones may be justifiably entitled to it [obedience] as well, and that general justice and dignity may be better served and achieved through non-submission or non-exclusive submission. Dworkin backs himself into the same corner as natural duty advocates who cannot produce a vindication of borders that saves the process of districting from making victims. His own perspective is at fault in this because he regards borders as an acceptable product of history, an opinion classically married to assumptions that being born within a jurisdiction is justification enough for restricted law abidance. C6particularity becomes an issue and so does ~~C03precise-districting/inclusion-~~

Secondly, there is the issue that his purported associative theory reads less and less like one. His claim that by submitting to law we preserve the dignity of others reads very much like Wellman’s claim that by submitting to law we preserve the safety of others. The idea of rescue however belongs to natural duty logics, not associativist ones. Protecting people’s dignity, whatever this may mean, from negative forces, including coercion, whatever that may mean, reads more like a natural duty we have in virtue of dignified humanity than an obligation we have as citizens towards co-members inhabiting the same particular space (~~C01Bnon-degeneration~~). Or, alternatively, it reads like a virtue one should exhibit, turning Dworkin’s account into something more akin to Edmundson’s virtue-ethics effort of describing law-abidance. Also, while C7conformity is satisfied in as much as states undoubtedly coerce, the fact that this imposition occurs vertically does challenge conformity: in real life, coercion flows down from institutions to citizens; so if it is not something we actually do to each other why does Dworkin think it brings about something we owe to each other? His portrayal of citizens as accessories to the wounding of [each other’s] dignities is unrealistic, because in actual political scenarios we are all victims of institutions. Finally, his account invites an interesting philosophical question about dignity itself. Throughout his justification Dworkin

assumes dignity to be damaged by coercion. The corollary of this is that we were more dignified as natural savages than we are as subjected citizens. But why? Insofar as dignity is, at least partially, a social virtue to be exhibited when trapped within adversarial relationships, why assume there would be less of it in the universe where there are regulated political communities? By Dworkin's own admission, life presupposes inescapable social interactions and connections that the state polices with a view towards maintaining social order and protecting the views and well-being of all involved. In these conditions, an argument could be made that states use their main tool, coercion, to ensure that in whatever ways we interact with each other our dignities are preserved.

Lastly but identical in vein to the previous objection, Dworkin's claims from reciprocity automatically remind us of arguments from fairness: if for Klosko obedience was fair repayment for the cooperation that led to benefiting, for Dworkin it is fair repayment for having facilitated the coercion of others (and bringing about the ensuing lack of dignity). Overlap is practically perfect and we are once again left wondering what kind of argument the legal scholar actually meant to advance, and what is the authentic ground of presupposed political obligations (meaning ~~CO1Bnon-degeneration~~).

To sum up, Dworkin's final thoughts on political obligation do not amount to proper justification either. His account presents with an unavoidable issue of unsatisfied particularity joined at the hip with a less damaging but still existing concern about conformity, and, more worryingly, solid evidence of degeneration. In its final form, whatever Dworkin's explanation imposes – in fashion certainly not restricted according to borders – does so not on an associative argument but on one from rescue or fairness. That imposition, however, is not political obligation because, as we have seen, fairness claims are cripplingly flawed and, as we shall see in chapter IV, rescue ones fail too. Dworkin's justification therefore fails C6particularity and CO1A and CO1Bnormative strength/degeneration, CO3precise-districting/inclusion, and C6particularity.

The faults in Dworkin's account will come back to haunt associativism. That is not to say this school of thought on the moral requirement to obey was discouraged by his inability to convince. Later proponents retained much of his associativist argumentative structure and, post-1990's, they argued much in the same way

(although without appeals to the true nature of communities) and consequently exposed themselves to similar objections.

In the interlude separating Dworkin's argument from the revival of associative theories of political obligations that would come following the confirmed failure of transactionalism, however, another category of thinkers used associativism to resolve questions on authority and obligations, namely communitarians. In as much as they were interested in these issues, communitarians argued the moral obligations of citizens – including obedience – to be derivative from the identity-shaping power of practices and of their power to generate obligations independently of superior moral principles. These two ideas would later significantly inform associativists, however, and count equally significantly towards their eventual dismissal. In the next section, I explore the identity and normative independence thesis in order to expose their normative weaknesses.

Communitarianism

Communitarians seldom regard political obligation as *the* battle. They are generally more preoccupied with deconstructing practices of blanket moral evaluations based in universalism, defending group and minority rights, with multiculturalism, and with criticizing liberalism and its individualist “proclivities” far more than they are with justifications for the requirement to obey. Because they perceive the relationship between citizens and states as like any other associative relationship that imposes obligations upon its members simply because they are members [in the relationship] they do not stop to spell out the content of these obligations, answer typical criticisms of associativism or, crucially, explain why performing these role-attached duties is always justified. Communitarians often have some of the same attitudes as defenders of the conceptual argument: if we pose too many questions about the obligations allegedly ascribed to roles then we do not understand what those roles are, what they entail; we are failing to experience them properly or even to make sense when naming them. A less charitable suspicion is that, had they observed the issue more closely, they would have eventually come to realise that the duties associated with these valuable relationships are grounded not in the relationship itself but in the moral principles that govern these interactions, which

would negate their claims that the normative burden is carried by membership/role-holding alone, and turn their non-voluntary associative account of obligation into a non-voluntary account of a natural duty. Still, communitarians do make two contributions that will prove to be fundamental to this particular school of thinking about obligations: the *identity thesis* (IT), which ties identity formation to social roles and the obligations attached to them (a thesis to which everyone from Alasdair MacIntyre, to Sandel, to Taylor, to Tamir, to Horton appeals) and the *normative independence thesis* (NIT) (discoverable in Dworkin- with the caveat from justice-, Gilbert and Horton) that awards local institutions and practices the power to create obligations independently for those circumscribed within them.¹⁸⁹ Simmons' makes both his targets "Associative Political Obligations".

Simmons' main objection to the identity thesis is that it automatically assumes that the "personal unintelligibility" that would allegedly follow the rejection of a moral obligation flowing from an identity generating role is justification enough for that obligation. Simmons denounces the idea that identifying with a role creates an authentic obligation to perform any and all duties that are part and parcel of it. To illustrate this point he provides the example of a Gestapo agent for whom the identity thesis is enough justification to perform the repulsive acts associated with his position: being a Gestapo agent *means* doing things that we now recognize as acts against humanity yet the identity thesis tells us that if said individual failed to behave in ways that constitute the very meaning of "Gestapo agent" he would suffer an identity crisis. To Simmons' mind this is clearly an undesirable conclusion to reach about the thesis. He also thinks this conclusion to be the reason why advocates of the IT decided to protect it by introducing the caveat that only morally sound practices and roles can be seen as instrumental in identity formation. This condition is self-

¹⁸⁹ For example MacIntyre writes that " ...the rational justification of my political duties, obligations and loyalties is that, were I to divest myself of them by ignoring or flouting them, I should be divesting myself of a part of myself, I should be losing a crucial part of my identity". See A. MacIntyre, in "Philosophy and Politics", J.L. Capps (ed.), *Philosophy and Human Enterprise*, Lecture series, 1982-1983, p. 158 (*apud* Simmons, "Associative Political Obligations", p. 80, note 37). Also, Sandel writes "those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are – as members of this family or community or nation or people, as bearers of this history, as sons and daughter of that revolution, [and/or] as citizens of this republic". See M. Sandel, *Liberalism and the Limits of Justice*, Cambridge University Press, Cambridge, p. 179. Tamir writes: "Deep and important obligations flow from identity and relatedness"; "These obligations are generated by social associations that induce among their members feelings of membership and belonging, as well as the belief that the preservation of their society is a worthy endeavour"; *Liberal Nationalism*, Princeton University Press, Princeton, 1993, p.99 ; p. 130.

sabotaging, however. Simmons thinks its introduction returns advocates to square one: if the morality of a social practice is made relevant, it is the morally sound nature of the practice that could justify obligation, rather than the alleged personal unintelligibility associated with the denial of obligations.

The glaring first issue here is that claiming that members of morally dubious practices, or even of largely neutral ones that sometimes deviate, do not have their identities shaped in any way by their belonging to these groups, and would not suffer any “personal unintelligibility” if removed from them just because their practice is not morally unobjectionable, is actually more offensive to reality than the original statement [that obligations attached to identity shaping roles are always justified]; if identity is influenced by group-membership then it is influenced regardless of the moral quality of the group. This is not a moral issue and not a discussion in terms of “should”; if the power to shape identities exists, its existing is not predicated on “niceness”.

Simmons also opines that the marriage with the normative independence does not provide the identity thesis with independent weight. When faced with the proposition that “we have moral obligations because our identities are constituted by social practices that also have the power to independently generate obligations” he thinks that appeals to the identity thesis are bound to seem “superfluous and misleading”.¹⁹⁰ Marshalling his point further, Simmons states that, even if we were to change the identity thesis to be more about identification (with a country, government, people) than about identity formation, no real progress would be made: questions about the morality of the practices with which people identify (as the identity thesis could be used to justify the obligations of oppressed people who have come to identify with their tyrannous government) and about the “correctness” of identification would still arise. In the wake of this analysis Simmons concludes that the “feelings of obligations toward our countries of birth or residence” could just be a form of false consciousness that communitarian theorists have not yet managed to disprove.¹⁹¹

John Horton defends communitarian theorists and their identity thesis in his *Political Obligation*. Horton starts by pointing out that Simmons dismissing the identity thesis as a form of false consciousness is no different from his later claim that

¹⁹⁰ Simmons, “Associative Political Obligations”, p. 82.

¹⁹¹ *Ibid.*, p. 83.

associativism (specifically Gilbert, as will be seen later) confuses felt obligations with real obligations.¹⁹² Possibly very true. That, however, is not in and of itself a proper argument against Simmons, because his quarrel with communitarians is not over whether or not attachments, real or assumed, play a significant part in identity formation but with the specific proposition that obedience to the law is part and parcel of who we are to a point that disobedience would lead to an identity crisis. That is the crux of the issue. In this direction, if we have little tangible proof that emotional attachments justify political obligations, we have even less to assume that ceasing to perform our political obligations would lead to a deconstruction of our identities. The implication that disobedience is in important ways a mean to the preservation of sanity, is a far-fetched proposition, if ever, ~~C7conformity~~ straining like at no point before. Life-experience (and arguably logic) indicates that identities are formed long before we reach adulthood and we “identify” with a political community towards which we become burdened with political obligation: our socio-economic and family backgrounds, our religion, education and sexual orientations, etc. are the sort of things that make us who we are before we become adult citizens with full rights and duties. Chronological precedence alone is enough to ensure that those play a much bigger part in identity formation than our role as citizen of a particular community burdened with a special obligation of compliance. Thus, it is hard to understand why communitarian theorists assume that failing to discharge our obligations towards the state – mundane, thoughtless, things such as paying taxes or obeying traffic laws – play such a crucial part in our personhood that failing to observe them will jeopardize our identity and sense of identification. In comparison to the factors mentioned above, the fact that, as legal adults, we come to have our freedom coerced by a set of rules and institutions, X, seems to have very little impact; state membership and duty-holding citizenship are more bureaucratic facts than anything else. In these conditions it is not at all obvious that we should agree with communitarians that renouncing these obligations would lead to personal unintelligibility and that they are therefore justified. The hypothesis does not appear endorsed by reality.

Horton goes on to make a second interconnected claim (built on Simmons’ alleged inability to demonstrate false consciousness) that it is Simmons who has to prove that the beliefs we hold as social individuals have no validity. This is yet again

¹⁹² J. Horton, *Political Obligation*, (2nd edition), Palgrave, London, 2010, p. 157.

an instance of failing to see the forest for the trees. Simmons' issue is not with the fact of socialization, or the idea that where we are contributes seriously to who we are, or even with the claim that some of our beliefs may be correct: it is with the proposition that political obligations are justified by the supposed determinant effect they have on identity formation and the implicit conclusion that a failure to discharge them leads to deconstruction. In clearer terms, he does not dispute that we identify as British, Italian, Spanish, etc. in meaningful ways, or that we have feelings towards these states or that being born and raised in their jurisdictions reflects in our personalities; he disputes. However, that paying taxes towards the local British, Italian or Spanish governments, or obeying their corresponding sets of laws, matter to such an extent in the process of identity formation that neglecting or denying these obligations would obliterate interior cohesion, and that this therefore renders them justified. Still, even if Simmons were wrong and our being socially *embeddedness* counted towards identity to the degree held by communitarians, that still would not show political obligation to be justified; firmly held beliefs, including about oneself and one's roles, and including those correct, are not in and of themselves justificatory of real or imagined attached duties. There is a gap between "I am/ I believe [correctly]" and "I must". These attachments (broadly speaking) have no generational power, as the ignored ~~CO5non-generational assumptions from attachment~~ states.

The normative independence thesis was arguably introduced as a way to preempt criticisms of the kind delivered above, on the idea that doubts about the role of obligations in identity construction and the above-mentioned gap could be solved by an argument that is tantamount to "if political obligation is not justified by their feelings and self-beliefs then it is something with which the practice itself can settle them independently of other factors". Simmons' article reveals that he finds the normative independence thesis quite exciting even if ultimately flawed.¹⁹³

Simmons' first argument in favour of rejection builds on the potentially vile or defective nature of the obligation-generating practice. In his opinion, the number of "unjust, oppressive, pointless, woefully inefficient, and in other ways normatively defective [local practices]" operating in the real world should be enough to make "either the certification of a practice by some independently justifying moral principle

¹⁹³ Interest is the result of the thesis's attempt to shift the production of normativity onto the practice itself. Simmons, "Associative Political Obligations", p. 85.

or the acceptance of the practice by those subject to it” a prerequisite for any polity assuming the ability to produce duties for its members.

His second argument rests on the analogy with the family proponents of the theses like to employ in order to draw conclusions about other non-voluntary groups. Horton explains that, much like within a family unit within which no moral justification is required for filial and paternal obligations,¹⁹⁴ there is no call for moral justification of the obligations we have towards each other as members of the community: both practices assign obligation automatically, without making appeals to higher order moral principles. The underlying intuition is that, in both cases, the obligations are obvious part and parcel of what the role is (to such an extent that a presumed X-role occupant asking for justification of actions Z and Y is someone who does not understand what X means and what Xing requires). Simmons nevertheless denies this obviousness. The core of this second counterargument is that we do not actually accept any supposed obligation attached to parenthood without scrutiny.¹⁹⁵ Simmons thinks that while it would be hard to deny that there are some statements about parenthood that are “self-evidently true”, this is not the same as saying that the practice of “family” ascribes obligations without any involvement from external and superior moral principles. *Ceteris paribus*, though there are bound to be some evidently correct statements about the community, this is not obligatorily synonymous with normative independence.

Simmons’ third and final misgiving about the normative independence thesis is that, in this battle between those who feel there are certain obligations that do not require justification and those who think that there are not, the only way to verify the thesis is by imagining a completely neutral practice and see if it is able to assign obligations. Simmons thinks that the existence and functioning of such a practice is highly doubtful because (1) all the practices that have survived history have had a clear moral or immoral purpose, thus making utter neutrality utopia and (2) the day-by-day functioning of such a neutral practice would be bound to create expectations that, when they were not met, would create frustrations inducing of discourses on moral principles such as fairness, utility, etc., thus effectively ending the moral

¹⁹⁴ Horton, *Political Obligation*, pp. 148-149.

¹⁹⁵ The very fact that some of us resist “paternal priority, abandonment or sale of children, genital mutilation, arranged marriages, and so on” is evidence enough that we do assess the demands of parenthood according to higher moral principles. Simmons, “Associative Political Obligations”, p. 86.

neutrality of the scheme.¹⁹⁶ Consequently, Simmons feels justified in concluding that we have “good reasons to be sceptical about the normative independence thesis”.¹⁹⁷

Simmons’ entire critique bears weight. To begin with a general observation, the normative independence thesis renders the identity thesis effectively useless. If local social practices have the power to generate obligations for those trapped inside them then the fact that they [could] also assist in identity formation is irrelevant; even if they did not, or if they stopped, those subjected to them would still have obligations. *Ceteris paribus*, the identity thesis stops being a reason why people have obligations and becomes only collateral to the obligation-generating power of local practices.

Secondly, that normative independence is the property of morally unobjectionable practices is not something that is necessarily true but something that is held to be true, in as much as political theory is averse, as a matter of principle, to awarding vile practices the power to create moral obligations. If normative independence can be something only [quality] just or reasonably just practices will exhibit, however, it begs the questions “how do we get to this conclusion about them” and “based on what”? The answers are arrived at through moral evaluations on the basis of the only moral standards we broadly hold to be generally acceptable – higher order moral principles. This translates the opinion into “normative independence could be a property only of practices that have been certified according to moral principles that have not been generated by the practice but which govern it nonetheless”. There is a high degree of logical inconsistency in this, insofar as “independence” is taken to be compatible with higher order principles retaining regulative power. And, if certification is required, we are returned to Dagger’s claim about the permanent necessity of “extras” in associative thought and to questioning whether it would not be sufficient – and more direct – to justify political obligation by directly invoking these superior moral principles.¹⁹⁸ A proponent of the thesis could try to soften the blow by claiming that the complete separation between the thesis and higher moral principles people interpreted communitarians as advocating is

¹⁹⁶ *Ibid.*, p. 89.

¹⁹⁷ *Ibid.*, p. 90.

¹⁹⁸ Horton does acknowledge this when he admits that higher order principles act as “general constraints”. But he believes them to be not “so extensive as to restrict severely the scope of local practices to generate political obligations” J. Horton, “In Defence of Associative Political Obligations: Part one”, *Political Studies*, Vol. 54, pp. 427-443, p. 436 and J. Horton, *Political Obligation*, Palgrave, (1st edition) London, 1992, 156-157.

exaggerated. Horton holds such a position: he reads it as saying not that local practices “are entirely independent of all broader moral considerations” but as allowing for some constraint by “general moral values”, in the sense that “local practices give these values [the higher moral principles] a particular shape, ordering and meaning within a specific social or institutional setting or way of life”.¹⁹⁹ It is not obvious why this argument is held to be conducive to success. The purpose of the normative independence thesis is to explain that a particular group of people has obligations (including political obligation) because the practice in which they conduct their lives as members has the power to generate duties for them without having to make any appeal to overarching moral principles. Reintroducing these principles into the argument, however minimally, does not further the thesis’s case. It only muddies the ground of obligation, since it leaves us wondering whether it springs from membership itself, from the normative power of practices or from the higher moral values that the practice exercises in a fashion adapted to local institutions (CO1A and CO1B normative strength-degeneration fail to be met again)- and therefore makes the discussion on the obligation-generating power of practices effectively useless, and eventually ruins the inner logic of the thesis by making principles that were supposed to be ignored bear on the practice once more; “independent” is, after all, in the same category of attributes as “pregnant” or “dead”- you either are or you are not. Also, as always, if obligations can be justified on the basis of moral principles it makes more sense to directly invoke the highest order principles, without deviating into a discussion on practices and their normative abilities; the particularity requirement can be met later, by simply explaining that local practices oversee the observance of these moral principles or on some argument from moral particularism.

Thirdly, serious concerns are raised by the strong conviction that questioning the duties attached to a role equates to a *de facto* failure to grasp what it means to be in that role. Simmons’ critique focuses on the factuality of assessment and on the idea that, while a role might have some self-evident propositions attached to it, that does not mean that all propositions will be so; a window of interrogation always exists. This is a good argument that needs perhaps tighter expression. The point to get across is that one can agree that a set of duties is constitutive of a role without going as far as claiming that there is no need or logic to ever question them in a justificatory sense.

¹⁹⁹ Horton, *Political Obligation*, p.162.

The question here is not one about the value or merit of the role itself but of the morality or necessity of performing those duties believed to be attached to it. The fact that being a parent presupposes caring for children does not necessarily mean that every act of care is necessary, required or even permissible. Advocates of the NIT, however, argue that when explanations are required it is sufficient to spell out the content of those obligations in order to render it obvious that being in a role is justification enough. But there is a real chance, contrary to Horton's opinion, that this spelling out might require the invocation of moral principles, discrediting their claim that obligation is rooted in the relationship alone.²⁰⁰ It is very likely that people behave the way that they do when they are in relationships, not because of some strong sense of identification or possession over that role but because they are prompted by internalized moral principles, and the corresponding duties of care, charity, rescue, fairness, etc. attached to them; and when the relationship is one with the state, towards which care and concern are harder to exhibit and which is arguably more diluted than traditional ones, behaviours – specifically the discharging of political obligation – are much easier to conceptualize as the contents of those duties than instincts triggered by the role itself. So even if communitarian contentions could make sense in the larger context of general relationships, they are not convincing when it comes to the obedience paradigm.

Finally, the defender of the normative independence thesis could argue that it is paradoxical to ask for an explanation for how the morally neutral practice Simmons imagined as a test for the thesis is capable of generating moral obligation. Simmons himself recognizes this in his article.²⁰¹ On some level this is true. There is nothing that indelibly commits us to assuming that requirements must obligatorily have a moral source, or even that political obligation is necessarily a moral duty. In this situation, the normative independence thesis could be rewritten as a statement that local practices are capable of generating obligations, moral and non-moral, independently of higher moral values. Nevertheless, even if the thesis is rewritten in this form and we change our historical perspective on political obligation as a moral duty, with the probable exception of those who think that calling for justifications for

²⁰⁰ Horton writes about justifying not going to a party in favour of attending one parents' wedding anniversary: "... would most likely involve spelling out what is involved in familial relations, at least as understood within a particular conception of family life, rather than referring to any general moral principle. Such obligations "derive" from membership of a family....". Horton, *Political Obligation* (1st edition), p.148.

²⁰¹ Simmons, "Associative Political Obligations", p. 90.

political obligation is testament to a failure to understand what it means to be a member of a community, people are likely to continue to demand an explanation for this power in spite of the potential paradox. The claim that “we have non-moral obligations because the practice that we are involved in has the power to create them and cast them upon us” is equally nowhere near self-evidently true.

What communitarians propose, therefore, are two theses weakly endorsed by common sense observations about selves, even embedded ones, and moral theory. They choose to ignore the facts, (1) that personhood survives an ill-performed role, (2) that while explanations of the role itself may be unnecessary, explanations of acts committed or committable on the basis of it are perfectly intelligible, and (3) that calls for external justification amount to neither a rejection of the role’s presumed value nor to an intellectual failure to understand it. More importantly, they hold obligations attached to roles as internally self-justifying without considering the very real possibility that those considered obligations may actually be duties tied to applicable higher order moral principles – the same ones which retained regulatory power and subsequently rendered the normative independence thesis fictitious. ~~Conformity~~ issues arise again and ~~COIA sufficient normative strength~~ is entirely missed.

Later associativists nonetheless saw great merit in these theses so they recur, especially in the work of John Horton. Before this final articulation of the associative paradigm, however, Margaret Gilbert delivered a slightly different version of associativism that will draw both Horton’s and Simmons’ attention. In the next section I show that Simmons’ critique of Gilbert’s account succeeds in face of Horton’s attempt to defend her.

Margaret Gilbert

Gilbert is a scholar of social agency who ties political obligation to something she dubs “joint commitments” performed by “plural subjects”, two concepts she develops throughout a series of articles and in her 2006 book *A Theory of Political Obligation*. To illustrate them she produces the example of two people who, “knowingly and intentionally” start walking together:

“I shall consider a small group comprising two people who are going for a walk together. I assume that their going for a walk together makes them a social group, albeit a small and transitory one. ... [Their] walking together demands a certain physical proximity. Such proximity is a necessary but not a sufficient condition for walking together, as the following example shows. Suppose that you and I are out on a walk. We are heading in the direction of Central Park. Now imagine that without warning you suddenly turn away from me, without a word, and cross to the other side, disappearing down East 49th Street. Perhaps I will not be disappointed. But I will surely be surprised, and I will, more strongly, feel that you have done something "quite untoward." You have in some way made a mistake. We were out on a walk, and you suddenly disappeared without any "by your leave....”

In Gilbert’s opinion these people have formed a “joint commitment” that bestows obligations onto both:

“Without attempting a precise definition of 'obligation', it is surely plausible to suggest that the concept of obligation applies here. If I am out on a walk with you, I have certain obligations. I shall now turn to the question of the ground of these obligations. How do people ever end up going for a walk together? This can happen in various ways. Usually there will be some kind of dialogue.. Or.. Case II: I am already out on a walk. You see me and enquire as to my planned route. "I'll come with you!" you say....I don't demur. We set off. The first case involves an informal agreement between the parties. What happens in the second case may not amount to an agreement exactly. Nonetheless the relevant understanding can be thus established...: each has expressed to the other his or her willingness to be parties to a joint commitment with a certain content..... As I understand it, all that is necessary to establish what I call a "joint commitment" is that the relevant parties mutually express their readiness to be so committed, in conditions of common knowledge. The common knowledge condition means that the existence of these expressions must be "out in the open" between the parties.”²⁰²

²⁰² M. Gilbert, “Group Membership and Political Obligation”, *The Monist*, Vol.76, No.1, 1993, pp. 119-131, pp. 122-123.

These lengthy quotations serve to show that, as far as Gilbert is concerned, whenever two people willingly and expressly start doing something (a shared goal both have and towards which both endeavour) together and recognize each other as participants in an enterprise they gain mutual obligations as members of plural subject formed through “joint commitment”. She explains that this joint commitment need not always be a “datable” process, one with a clear, easily identifiable point of origin: occasionally plural subjects “grow up somehow” or “just happen”.²⁰³ Once they begin “walking”, however, participants have an obligation to continue together in their pursuit and to behave in a way appropriate to their activity for an unspecified – but seemingly permanent – period of time.²⁰⁴ This rule applies to all plural subjects formed through joint commitments, be them tiny ones or very large ones such as the state. To Gilbert’s mind, the polity is an entity created, through a joint commitment governed by rules engendering of institutions, and sustained by citizens with an “us” mentality, “our” vocabulary and powerful feelings of attachments towards their communities.²⁰⁵ About the precise manner in which an individual can commit to one of these already created statal plural subjects Gilbert writes that belonging is contingent on (1) the individual routinely behaving like a member of society and (2) being recognized as such by those that already are full members.²⁰⁶ In the aftermath of this social process of recognition (which Horton dubs “the social convention”) that person becomes duty bound to that community irrespective of its moral character;²⁰⁷ together with the other members he will then be:

²⁰³ Gilbert, “Group Membership and Political Obligation”, p. 125.

²⁰⁴ M. Gilbert, *A Theory of Political Obligation*, Oxford University Press, Oxford, 2006p. 214.

²⁰⁵ These rules and institutions are what citizens are supposedly jointly committed to.

²⁰⁶ This idea of recognition is important in Gilbert’s thought but somewhat hard to trace. See M. Gilbert, *On Social Facts*, Princeton University Press, Princeton, pp. 217-219; Gilbert, *A Theory of Political Obligation*, chapter 7; or M.t Gilbert, “Mutual Recognition, Common Knowledge and Joint Commitment”, pp.10-11, available online at <http://www.fil.lu.se/hommageawlodek/site/papper/GilbertMargaret.pdf>: “In further explanation of my proposal, something must be said, briefly, about joint commitment. One who invokes joint commitment in the sense I have in mind allows that, just as an individual can commit himself, by forming a decision, for instance, so two or more individual can commit themselves as one. In order that this come about, something must be expressed by each of the would-be parties, and that is precisely his personal readiness to be jointly committed with the other in the relevant way”.

²⁰⁷ See Horton, *Political Obligation*, p. 153. A controversial qualification for most but not for Gilbert, who does not believe political obligations are moral obligations; Gilbert, *A Theory of Political Obligation*, pp. 285-286.

“obligated to uphold its political institutions by virtue of [his] membership in that society, and membership is a matter of participation in a joint commitment to accept together with the other members the political institutions in question”.²⁰⁸

As mentioned, Gilbert’s work would be a cause of a great debate between Simmons and Horton, with the latter endeavouring to defend it from Simmons’ repeated charge from confusion. Simmons’s first complaint is that Gilbert obfuscates “felt obligations with genuine obligations”. In his opinion, the fact that citizens use the vocabulary of “our” – our government, our country, our state – does not amount to them having real obligations but is, at most, indicative of a “vague feeling of indebtedness” that is not synonymous with having a concrete duty. Simmons’ conviction is that “confused, oppressed or unthinking feelings of obligations are too common a feature of our moral lives to make reasonable such leaps of faith”, i.e. permit us to use them as the foundations for the very real and very heavy duties citizens are burdened with.²⁰⁹ John Horton disputes this criticism in *Political Obligation*.²¹⁰ He rephrases Simmons as saying that people live under “some kind of mass delusion” and rejects his outlook as having no force. He writes that associative theorists do not deny “the bare possibility of error [in the feelings of indebtedness people experience towards their community]” but rather sees this possibility as having “no independent weight”, as not managing to establish anything definitive about people and their obligations.²¹¹

There is merit to both claims: while probability suggests that at least part of our feelings and attachments may be the results of manipulation, indoctrination, confusion, or mere socialization [within a particular group] this does not necessarily entail, as Simmons appears to believe, that they are insignificant, as moral charges go, and lacking in ability to settle us with *some* duty.²¹² The truth most likely lies somewhere in the middle. But as a general point of theory alleged feelings do not constitute an appropriate foundation for an actual obligation of the magnitude and

²⁰⁸ Gilbert, *A Theory of Political Obligation*, p. 289.

²⁰⁹ Simmons, “Associative Political Obligations”, p. 75.

²¹⁰ John Horton’s reasons for defending Gilbert may not be entirely altruistic, as criticisms of Gilbert stand against him and other associativists as well.

²¹¹ Horton, *Political Obligation*, pp. 153-154.

²¹² Although, as always, it is plausible that these duties may be back-traceable to superior moral principles, making these obligations not consequences of attachments but whatever natural duties are applicable to the relationship in question.

weight of political obligation. If their existence is disproven then Gilbert and Horton would have, in a best-case scenario, burdened free people with demanding obligations on a singularly weak basis of supposed attachments; whereas in a worst-case one they would have bound manipulated or terrorized people to obedience towards tyrannical regimes.²¹³ Suppose however, for the sake of argument, that feelings could function as solid grounds for obligations. The consequence for us would still not be resolution to the problem of political obligation. Linking it to feelings (understood broadly) is bound to generate very random, very unstable results because emotions are mutable, changing and ultimately unknown to anyone other than the agent; and it seems counterintuitive to assume that throughout their lives people, individually and collectively, will experience sentiments of affection towards their country and fellow citizens firm and coherent enough to support permanent obligation. Given this volatility, if Gilbert wants to marshal attachments as sources of obligations she'd do well to discover a baseline of emotion after which all citizens can be said to have a *quantity of quality* affection sufficient to generate duties. As such, while a blanket ban on feelings as grounds for duty may be an unwarranted, as a foundation for political obligation they function exceptionally poorly. Gilbert may not yet fall afoul of CO6non-confusion but insofar as she does tie political obligation to attachments she does fail CO5non-generational assumptions from attachments.

Gilbert's second error according to Simmons is her muddling of the distinction between passive acquiescence and "positive obligation-generating acts or relationships". Simmons thinks that going along with one political arrangement or another does not constitute commitment, even if that acquiescence has happened in "full conditions of knowledge" or for a significant portion of time: just like playing a game by the rules set by a "pushy participant" does not "commit us to accepting his further plans or pronouncements about the game or about anything else", the "preparedness to continue as a participant in the political game [does not] entail any commitment or obligation to future obedience to and support of the political community's government].²¹⁴ Simmons' insight is that, in the absence of a clear commitment, no behaviour, regardless of how routinely performed, will lead to obligation. In reply, Horton questions Simmons' judgment not to provide a list of

²¹³ Unless she wants to qualify her theory by claiming that attachments produce obligations only for plural subjects in just societies, in which case she finds herself faced with the old charge that associative theories cannot ground political obligation on their own.

²¹⁴ Simmons, "Associative Political Obligations", pp. 75-76.

positive obligation-generating acts or relationships or to explain why Gilbert's joint commitment is not a part of them, under any circumstances.

Horton's objection is not without reason. Simmons' underlying voluntarist convictions make him uncomfortable with the associativists' lack of intention to trace back political obligation to a single, clear, voluntary act. Although Simmons may not be as ready as he should be to embrace their point of view, however, two things do justify his counterargument. One is a theoretical necessity to distinguish between correct sources of obligation and routine behaviours, including ones of obedience: that I comply all the time does not confirm that I am obligated. The difference is the one between "I do" and "I have to do". The other is Gilbert's misleading vocabulary, which often belongs to the voluntarist tribe with which she entertains a mysterious relationship. Associative theories of obligation are by definition non-voluntary. Although Gilbert circumscribes herself within this tradition, in the article to which Simmons replies, she does not shy away from repeatedly using the jargon of voluntarism: she writes about the "willingness" or "readiness" of people to become parties to the joint commitments; she claims that, in order for a joint commitment to exist, people must *express* their desire to be involved "out in the open";²¹⁵ and the alternative replies available to the people in the walking together example she constructs could just as easily be used to exemplify the two classic forms of consent.²¹⁶ All of these could be interpreted as the countenance of commitment to voluntarism. Many of Gilbert's readers were thrown off by her writings, so many that in her book she had to explicitly deny her adhesion to contract theory, in a statement that arguably does very little to resolve the issue.²¹⁷ Voluntarism was, and is, a dark shadow perpetually looming over her account.

Gilbert's account reading somewhat like a transactional account is not the only departure from more traditional associative theories. Unlike other associativists (and communitarians) she does not focus as much on the meanings of membership and

²¹⁵ "...each [participant] has expressed to the other his or her willingness to be parties". Gilbert, "Group Membership and Political Obligation", p. 122.

²¹⁶ *Ibid.*, p. 123.

²¹⁷ Gilbert writes that even though her work "has been cited as a form of 'nonvoluntarist contract theory'... it does not in fact appeal to contracts or agreements, but it is in an important sense 'non-voluntarist'. According to the theory, an understanding of joint commitment and a readiness to be jointly committed are necessary if one is to accrue political obligations, as is common knowledge of these in the population in question. One can, however, fulfil these conditions without prior deliberation or decision, and if one has deliberated, one may have had little choice but to incur them". Gilbert, *A Theory of Political Obligation*, p. 289.

communities or on the process of identity formation; and, in spite of her initial insistence that attachments produce obligations, Gilbert eventually shifts focus onto one's acting like a member of the community and being recognized as such by others as the sources of obligation. The important observation to be made here is that, while most associative theories of political obligation are internal-focused, hers is predominantly externally oriented towards responses triggered in others: Gilbert's account rests primarily on outward behaviours, rather than on internal emotions or convictions. In these conditions we can see that Simmons, in spite of his plausible wariness that Gilbert is a closeted voluntarist, was still mistaken in reading Gilbert as saying that one's behaviour alone is able to generate duties. He omitted Gilbert's caveat that individual attitudes/behaviours produce obligation *only when in concert* with the social convention: it is not enough for one to act like a member; he must be recognized as one as well. Gilbert's theory is thus not about individual behaviours *tout court* but about imitating behaviours that elicit a very particular response in other people. In the end, it [seems that] the social convention carries the brunt of the weight of obligation, not the activities of the individual.²¹⁸

If this is correct, then Gilbert, while not as prone to confusion as Simmons holds her, has still departed from the original associativist trail considerably (sufficiently for CO1A, CO1B normative strength-degeneration to fail to meet) with very slim pay-offs at best. The problem with making political obligation contingent on recognition is that it can fail to happen, happen for the wrong reasons, or not be uniform. Additionally, there is a logical gap between being recognized as something and actually being something. The proposition "I am recognized as something ergo, on this basis alone, I am something" is not obviously true. There is a space between the two that is not filled by someone's behaviour, as Gilbert intended. Aside from the fact that the argument from behaviours has that whiff of voluntarism that is hard to shake off, and is deeply problematic for an author facing accusations of being improperly committed to non-voluntarism, the opinion that such behaviour can be a source of obligation will face the same difficulties as tacit consent. Recall that in the latter's case the problem was identifying the kind of "meaningful silences" in clear choice situations that could be taken as consent. In this scenario, the hardship lies in pinpointing (1) the cases in which individuals who have been recognized as members

²¹⁸ This becomes particularly clear in Gilbert's "Mutual Recognition, Common Knowledge and Joint Attention".

have behaved impeccably as such and vice-versa, and (2) the types of behaviours that have been acknowledged as capable of turning outsiders into members.²¹⁹ These difficulties bring about a multitude of associated questions, each hard to answer: (in no particular order) “how does one come to know that there is a difference – in terms of community belonging – between him and some other individuals”, “when does this awareness begin”, “what sort of acts of proper members should be imitated for the agent to be seen by others as acting as a member”, “how do we differentiate between those who always act as members and those who just happen to occasionally mimic some of the behaviours of proper members”, “how can we be sure we have not recognized as a member someone who just happened to act like one at the precise moment of observation”, “how long must one behave like a member in order to be confirmed as one”, “does ceasing to act like a member lead to interruption of political obligation”, “how do we know for sure that the social convention has taken place”, etc. Arguably, few of these worries can be alleviated, and thus proper situations in which adequate behaviours have been exhibited and recognized as indicative of a desire to become a member are bound to be as few as the situations in which genuine tacit consent could take place. Gilbert says little to convince us otherwise.

Simmons’ third and final counterargument to Gilbert is that she mistakes “reasonable expectations” with “justified entitlements”, that she fails to realize that we are not automatically authorised to make demands on people who are simply going-along with an arrangement, no matter for how long. In Gilbert’s defence, Horton responds that “while mere regularity is not sufficient to generate an obligation ... it seems hard to imagine how social life could proceed in complex societies like our own unless there were some obligations explicable in terms of reasonable expectations arising from broad and impersonal patterns of behaviour, rather than just close interpersonal relationships”.²²⁰

Again, truth is probably halfway between the two positions. At some point, a detected action routinely performed becomes a habit for observers as well. And while it would be awkward to claim that the housewives of Königsberg were “justifiably entitled” to Kant’s precisely timed promenade, they were justified in their expectations to see him (minimally in the sense that they were rational in their expectation) and, if somehow dependent in their clock setting on him, even entitled,

²¹⁹ What are they, how do we know these are them, how do people learn about them.

²²⁰ Horton, *Political Obligation*, pp. 154-155.

albeit in a constrained fashion. Horton can be right, therefore, but only in the same restricted way. Insofar as there is a gap between bona fide “justifiably entitled” and “justified / justified and partially entitled”, Simmons’ objection is fair, however, Gilbert’s account is finally guilty of ~~CO6 non-confusion~~.²²¹ That patterns create genuine obligations is a far-fetched claim. Against this one might invoke the UK’s “right to roam” legislation. That, however, is not paradigmatic of what Horton and Gilbert are claiming. A better example would be that of an adult son who is still being financially supported by his parents: though we cannot deny that months or years of this does generate “reasonable expectations” we also cannot assert that the parents are morally, much less legally, obligated to continue financing their son past the age the law deems him to be a fully mature, responsible human agent. An entitled offspring, even one justified in his belief and with an intelligible claim to it, does not make one an obligated parent. Of course, the duties of charity, aid, samaritanism, as well as some measure of parental responsibility still exist and inform the relationship, but they are the kind of natural, moral duties that one has *qua* human, not obligations. We can extrapolate from this to draw some conclusions about Gilbert’s account; while she can intelligibly state that members of a community can expect of each other member-like behaviours if they have performed them for a considerable amount of time, we ought to be wary of maintaining that there is a blanket obligation to continue; people may just be play-acting, that mysterious process of recognition might not have taken place yet or have been the result of error, the person might have changed their mind, or simply made a mistake. And in the absence of the possibility of perfect knowledge about the kind of behaviours that trigger the recognition in question, of the context in which they should happen, of the lengths of time they should happen for, etc., people may stop performance on a simple claim of excusable ignorance.

Gilbert’s underlying thought is transparent: sometimes people act in ways that elicit responses and reactions in others that may be important or on which they may come to rely, thus making consistency a fair response, or at least inconsistency somewhat unfair. But the opinion that behaviours, unaware ones in contexts not evidently known to or publicly/ explicitly recognized as fertile grounds for becoming

²²¹ Or perhaps “justified” and intelligibly claiming entitlement; although the claim itself is not true it can be believed, and it can be understood why the speaker thought himself justified in raising it. In this scenario, however, while the agent would not be committing a morally objectionable act in claiming, and his statement would not be unintelligible, both his claim and the convictions behind it would still be false.

bound, can, on their own, incontestably and non-problematically generate rights against is a hard pill to swallow, even on a background of non-voluntarism. This is most probably the reason why she felt compelled to couch her argument with that sliver of voluntarism that Simmons found puzzling. Thus when she recanted in order to avoid muddying the grounds of obligation and philosophical orientation, she was left with an account of political obligation that relied authentically only on recognition. Interpretation though is not a proper source, for the reasons mentioned above: it can be mistaken, it may be precipitated, it may draw definitive conclusions on the basis of one-time experiments, accidents, *interruptable* performances and so on. And it is a slippery slope that could end up in serious deviations.²²² This is a step up from conceptualizing people as socially embedded to conceptualizing them as social puppets. To an important degree, her account is morally objectionable, insofar as political obligation is not the consequence of an act, or an imposition of a higher order moral principle, or a way to properly engage with our fellow citizens, but the result of a random conclusion reached by others.

Aside from this, a proper account of political obligation should offer certainties as to when obligation begins and how it can end, especially if it advocates such an intimate connection to “entitlements”. Gilbert’s justificatory narrative ought to have made it clear at what point reasonable expectations transition into entitlements. Her account opens up at least three possibilities: 1) we initially expect one to start behaving like a member and obey and then, once one begins acting in such fashion, we immediately become entitled to obedience; 2) we expect one to continue to act like a member once one starts but we become entitled to obedience only after the social convention takes place; or 3) we expect one to continue behaving like a member once one starts, after a while we become entitled (when exactly?) to this behaviour and obedience, and only then does the social convention take place. Each of these options creates snags: in the first case Gilbert would have to produce some arguments as to why something that has no precise point of commencement, that could be a mistake, and could be easily intended as an experiment or test, produces instantaneous obligation; in the second and third she would have to provide more information about the exact moment when the social convention takes place and

²²² According to Gilbert once you are recognized as a member you have to obey *tout court*. Her political obligation has very little *prima facie* character.

entitlement begins, about the form the social convention assumes, about whether or not the new full members are informed of their recently acquired status, and so on.²²³

Three final theoretical counterpoints to Gilbert's construction should be mentioned. One is that her concept of "joint commitment" – which ultimately plays a limited role in her theory of obligation – has no distinguishable connection to the reality of politics. What are the people of a political community supposed to be jointly committed to, specifically? In her book, Gilbert claims that they are jointly committed to rules "that count intuitively as institutions".²²⁴ Since in a political setting, however, rules are specifically spelled out and imposed from above, there is nothing intuitive about our institutions, and citizens are determinant to neither (these sort of constitutional and legislative constructions being outside the scope of their political influence), meaning that the question about purpose remains pertinent.²²⁵ As Gilbert leaves it, people obey the rules for either a mysterious purpose or for the sake of obedience itself. If Gilbert's subjects are "walking" they are therefore doing it for nothing specific, for something they are unaware of, for something they have no control over, or for the sake of walking that is good/moral/valuable in itself, which could bring about obligation arising from transactions or from a natural duty, but that does not obviously produce obligation arising from an associative claim. The second counterargument is that her joint commitment, independently of all other objections, is not even a relationship, let alone a special one. Drawing on Seglow's observation that relationships presuppose performances designed to meet the normative expectations participants in the relationship have of each other, I hold that what citizens do for one another, if anything, individually or collectively, is not indicative of the existence of a relationship.²²⁶ That they legally belong to the same state formation is a connection resulting from happenstance, not evidence of a relationship that members endeavour to maintain in an intentional way. Apart from the claims from vocabulary and mentality that Simmons dismissed, Gilbert offers no argument to dissuade that what citizens have are not relationships but impromptu interactions happening when their individual universes of goals and preoccupations happen to brush against each other. As for the final criticism, Gilbert offers her citizens no

²²³ In addition, there is the issue of reasonable disobedience for which she makes no obvious accommodations.

²²⁴ Gilbert, *Political Obligation*, pp. 238-239.

²²⁵ Also see Knowles, *Political Obligation*, p. 188. He too fails to see the exact purpose of the joint commitments, of the rules/institution, of the walking.

²²⁶ J. Seglow, *Defending Associative Duties*, Routledge, London, 2013, p. 29.

opportunity to disobey, which is particularly problematic for her because her political obligation is not a moral one, meaning that the usual regulative power of moral principles may not apply as usual. ~~C3reasonable access to disobedience~~ is therefore yet another stone in Gilbert's shoe.

Based on all the reasons above I find that Gilbert's theory is an unconvincing mixture of claims that ignore C7conformity, CO5non-generational-assumptions-from-attachments and CO6non-confusion and that alternate between being dangerously transactional in spirit and plain insufficient.²²⁷ Unfortunately, apart from the former, there are all accusations that could be levied against Horton's associative account, the last enunciation of the paradigm.

John Horton

Horton's argument builds on many of the issue discussed before. He begins his theory with a declaration that he does not intend to "say very much about the specific content of political obligation... because... to some extent, at least, such obligations will vary between polities".²²⁸ This is an odd declaration, considering that political theorists seldom spell out the content of political obligation on the idea that the core is obedience towards the law. Horton may have felt compelled to be explicit, however, in order to protect himself from Simmons' charge that, unlike political obligations, associative obligations have unclear, "indeterminate" contents.²²⁹ To his mind, however, this "broadness" does not amount to indeterminacy in content (Horton agrees this would be problematic) but is an expression of a perspective on contents as being more locally determined: "it is the character of the particular polity to which one belongs that precisely determines what one's obligations will be".²³⁰ This begs the questions "what exactly constitutes the *character* of a polity" and "how does it reflect in the contents of political obligations". One option is that this character consists of, and is predicated on, the things that the members commonly like or

²²⁷ A.J. Simmons, C. Wellman, *Is There A Duty to Obey the Law?*, Cambridge University Press, Cambridge, p. 112. Maybe even principle of fairness ones; as a point of language "joint commitment" seems a perfectly appropriate renaming of "joint, cooperative enterprise".

²²⁸ Horton, *Political Obligation*, p. 167.

²²⁹ A.J. Simmons, "Philosophical Anarchism", A.J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press, Cambridge, 2001, pp. 102-122; M. Egoumenides, *Philosophical Anarchism and Political Obligation*, Bloomsbury, London, 2014, p. 165.

²³⁰ Horton, "In Defence of Associative Political Obligation: Part two", *Political Studies*, Vol. 55, No.1, 2007, pp. 1-19; Horton, *Political Obligation*, p. 167.

dislike, the way they behave themselves, the routines in which they have, *en masse*, fallen, the cultural and other elements that are specific to them. How do these impact on political obligation in a determinant fashion, however? Furthermore, if the political obligation of an Italian will differ from the political obligation of a Rwandan, what are the implications for our attempts to deliver an account of the moral requirement to obey with blanket efficiency? The other option is that this is a restatement of the normative independence thesis whose problems have been already examined. Either way, this is both theoretically uninteresting and irrelevant, since Horton obviously has in mind obedience as the singular route to the satisfaction of the associative duty towards the state.

Following these initial declarations about his goals, Horton makes a series of more or less acceptable statements that he nevertheless regards as self-evidently true. He starts by saying that “we recognize that our government is entitled to make claims on us and we may have legitimate expectation of it, which cannot be explained without reference to the thought that it is our government”.²³¹ One could easily counter-argue that this recognition, if it exists, (1) is the product of the false consciousness to which we become subjected after living for a prolonged period of time within the borders of a certain territory, *pace* Simmons, (2) that this is the sort of statement intuition and dialectic suggest but for which there is little evidence, *pace* Green,²³² and (3) that the expectations that citizens have of their states are most likely to be rationalized in terms of “we pay taxes so you [government] owe us X.Y, Z, etc.” than to flow from our thinking of the state as belonging to us in an important sense (so *conformity*)²³³ Horton continues by writing “we acknowledge that over many areas of our life our government has authority... [meaning that it can] make decisions that we are under an obligation to accept just because it is our government. It elicits a great many feelings from us, some of which imply an emotional bond.... pride and shame.... ”.²³⁴ A sense of attachment – arguably not towards the government but towards the others – does not mean we have recognized a particular set of institutions as having authority over us or as being in control over aspects of our lives; and if we did that would not necessarily mean that they have or are (CO5non-generational-

²³¹ *Ibid.*, p.169.

²³² L. Green, “Who Believes in Political Obligation?,” J. T. Sanders, J. Narveson (eds.), *For and Against the State*, Rowman & Littlefield, Lanham, 1996.

²³³ This is essentially a second take on Simmons versus Horton. The counterarguments to Horton made there still stand.

²³⁴ Horton, *Political Obligation*, p. 170.

assumptions-from-attachments). The fact that we hold a set of claims to be intelligible, believable, even acceptable is not testament to their validity. And if such recognition exists it may say something Razian about authority, but nothing about political obligations; self-regarding beliefs do not create content-independent moral requirements that put us into a relationship with parties that gain power-rights against us. Additionally, we have no confirmation of Horton's statements and no overwhelming reasons to suspect them to be true. It may very well be the case that people simply, uncritically and unemotionally regard their government as an accident of birth whose consequences – policies – they will have to suffer for the remainder of their natural lives. Furthermore, if any feelings towards government are experienced, they are apt to sprout only in special circumstances – wars, disasters, national feasts, popular upheavals, sporting events or major socio-political-economic breakthroughs. Life in modern communities informs us that no one is subjected to strong positive emotions towards their state on a regular basis. Governmental decisions and the ensuing political obligations those supposed feelings are presumed to sustain are, however, an enduring feature of day-by-day life, and logic informs that it is counterintuitive to use something intermittent as grounds for something permanent. Unencumbered by this however, the philosopher adds “we cannot think of the state without thinking of individual citizens or vice-versa”.²³⁵ There is logical truth to this. Citizenship without a state is a clear logical impossibility. Nevertheless, an individual without citizenship is still an individual and she need not necessarily be confused about any aspect of her identity, as this restated identity thesis probably means to convey; people can exist outside of the boundaries of a state, as personhood is not contingent on state identification. Finally, Horton asserts that “being a member of a polity is a fact that already has an ethical colouring and significance”.²³⁶ It is a proposition with vague meanings, Horton's lines being open to interpretation: is he suggesting that holding a/any citizenship is morally correct, is he saying that our being recognized as members confers an additional moral layer onto us that we previously lacked, or is this some Kantian opinion that people's basic rights and duties are partly determined by the state in whose legal jurisdiction they were born? The latter is the sort of position natural duties proponents typical adhere to (sic) whereas the first two bring about separate misgivings: legal membership into a polity

²³⁵ Horton, *Political Obligation*, p. 170.

²³⁶ *Ibid.*, p. 171.

ought to be considered a morally neutral fact and holding the moral charge and moral significance of individuals to be affected by whether or not they are recognized by others as body politic members signifies discovering categories of moral worth in humans that apply independently of their actions-which is awkward at best. Horton's further elaboration on this supposed ethical significance sheds no additional light, as he links it to meaningfulness- "being members of a polity [is] something meaningful". This is an intuitively appealing proposition but it is also problematic as it returns us to the confusing issue of meaning, a meaning that this time does not exclude the requirement justification but that still has the power to generate normative consequences. No explanation as to why this is necessarily so is forthcoming: membership could say something about us and yet not have a moral charge. It is not obvious why having our birth certificates issued by institution X in country Y is normative and not just descriptive. Horton never considers this possibility; he abruptly affirms "our membership of groups such as family or polity are not just morally neutral facts about us" which in turn begs the question why Horton is so ready to rank people morally on the basis of what are simple, random facts of their existence.²³⁷

Once these clarifications are established Horton finally erects the three pillars of this theory: an associative component patterned on the established model, a principle of value-utility and an identity thesis. Following Andrew Mason's typology, he first describes the community as a group (to be "distinguished from a mere category") of people "who act together, or who cooperate with one another in pursuit of their own goals, or who at least possess common interests"; this group has "structure", "persistence" and "routinely figures in practical reason and deliberation, including moral reasoning and deliberation".²³⁸ Then, he argues that these groups (communities, states) have value based on considerations of utility. Horton believes that, even though these groups are non-voluntary, they still make society "worthwhile" because of their indispensability to secure and ordered life. Subsequently, in Hobbesian fashion, he explains that any form of association will need: "...effective coercive authority to provide order, security and some measure of social stability", that "... if human beings are to live together for any length of time and have any prospect of worthwhile lives, at least in groups that extend beyond those

²³⁷ *Ibid.*, p. 172.

²³⁸ *Ibid.*, p. 173.

that could be held together entirely by bonds of affection, there needs to be some reasonably effective regulatory body” and that “the basis of the need for order and security, backed by coercion, is to be found in the many differences between people....”.²³⁹

This argument from value is problematic in three ways. First of all, as stated and restated, that a role has value and that a role presupposes duties does not entail that the role justifies any instance of performing the duties it is held to presuppose. Although nobody would deny that filial roles have value and meaning, or that a set of obligations is subsumed within them, these requirements are potentially and plausibly justified as the contents of the duties of care, rescue, charity, fairness, etc. inherent to the position, rather than by the position itself. The claim “I have to do what my mother asks because it is my mother who asks” suffers further probing than associativists think, and it could [would] reveal that, in instances, applicable moral principles might disallow certain actions as objectionable and therefore unjustified. As long as we accept this latter possibility – for which we have many confirmations, particularly in courts – we have to accept that “because she is my mother”, while a sufficient answer in certain instances, is neither a complete one nor a necessarily correct one. Secondly, there is an issue arising from the fact that this argument reads as very utilitarian. Value aside, Horton gives the impression that at least part of the reason why we have political obligation has to do with the fact that states are efficient and indispensable (allegedly) in the provision of order, security and regulations. True or not, the effect of this is a muddling of the grounds of obligation that leaves us to wonder whether obligation flows from us being members of the community exclusively or if, perhaps, the state’s being useful plays some part in the generation of obligations as well;²⁴⁰ thus it makes him look suspiciously close to marshalling a multiple principle theory of political obligation that prioritizes an associative argument (which we already have strong reasons to suspect as a front for an account from natural duties). ~~CO1A~~ leading to ~~CO1B~~ normative strength-degeneration rear their ugly heads again. Thirdly, there is the fact that this argument, such as it is, has no force. Aside from the fact that something being valuable is no argument for

²³⁹ *Ibid.*, pp. 176-177.

²⁴⁰ Since Horton is explicit that “the argument so far [the associative theory] ...needs to be supplemented to show that....a polity is a form of association that can have value for its members” I take him to have intended this argument from utility to run in conjunction with the associative argument and to have, most likely, desired the justification of political obligation to rest on both. Horton, *Political Obligation*, p. 176.

submission, there are the added considerations that (1) in a best case scenario it could only account for a minimal state, (2) the possibility of alternative supply exists and (3) *pace* Green, people will not value uniformly, meaning that generalizations will be difficult.²⁴¹ C1generality and even CO8accounting-alternative-supply come into play. In addition, while some argument from enough blanket appreciation could be constructed and alternative supply lessened as a threat by explaining it is a possibility rather than a reality, the first and last objections stand.²⁴²

The third and final element of his theory is a brief narrative on the relationship between identity and community. Taking the baton from communitarian theorists, Horton maintains that our identities are shaped by our living in a polity. According to him, “as members of that polity we assume an identity and acknowledge a relationship to its institutions, practices and members”, an identity which will not remain the same “if the connections that constitute membership of a polity are severed [because] my self-understanding of my relations to other people and institutions, and how they regard and relate to me, are in various respects transformed”.²⁴³ He is also certain that “through our political identity we acknowledge or recognize our corresponding political obligations”.²⁴⁴ Because Horton’s identity thesis differs in no significant way from the communitarians’, and his argument from recognition mostly mirrors Gilbert’s, the criticisms that were made to them earlier on apply to Horton’s discourse on identity as well. The only thing to be added here is that Horton’s choice to link identity to political obligation should have been accompanied by resolutions to problematic situations, such as when individuals fail to identify with the groups in which they were born, when they identify wrongly, when they assume conflicting identities (between groups and sub-groups), or when they identify with a group that rejects them. The statement that our political identities help us distinguish our political obligations however raises some separate misgivings. It appears to be in the vein of the conceptual argument. Recall that the conceptual argument held that only those who do not understand what it means to be a member of a community would demand a justification for political obligations. Horton seems to be saying much the same thing: if we understand the true significance of membership, i.e. if we identify

²⁴¹ L. Green, *The Authority of State*, Clarendon Press, Oxford, 1988, p. 233.

²⁴² Here, alternative supply is not used to indicate only the possibility that groups other than the state may provide social order. It is also a euphemism for other relationships – similar to the one between citizens and state – that could be assigned value.

²⁴³ Horton, *Political Obligation*, p. 182;p. 184.

²⁴⁴ *Ibid.*, p. 186.

with a certain group, then we will acknowledge our now obvious political obligations. In the conceptual argument's case this sort of thinking was somewhat dangerous because it rejected the need for justification. In Horton's case this opinion about the connection between identity and political obligation is not dangerous but, at the same time, does nothing to help his argument. Those who are convinced by his earlier statements about the individual-community relationship, his argument from value/utility, his claims about duties pertaining to roles, etc., will not need this further reassurance; it amounts to overkill. Conversely, those who have not been persuaded by Horton's efforts will regard this as yet another exaggerated claim about the powers of legal belonging and identification. This opinion on the instrumental value of identity is therefore neither necessary nor helpful.

As such, Horton's associativism did not fare better than previous efforts: it retained all earlier problematic issues while what was new by way of addition or clarification was unable to alleviate concerns. In his latest work, Horton takes issue with some of these criticisms, specifically the charge from voluntarism and the accusation that associative accounts, including his, do not distinguish themselves in any significant way from natural duties. To counter the first claim that associativism has something of consent theory and is thus in danger of falling into its traps, Horton writes that the process of recognition occurring, a process not completely separated from voluntarism, is just a mechanism through which one is identified as a member of a community and in no way a generator of obligation. The exclusive ground of obligation remains at all times the relationship itself, one devoid of any will and intentionality and therefore in no danger of exhibiting transactional features. We can admit this much to be true about his account. Horton's justification never seemed ready to slip into consent theory, certainly not to a degree comparable to Gilbert's, for which this issue was, and remains, a problem. Horton's commitment and reliance on non-voluntarism are unquestionable.²⁴⁵ He then tries to alleviate concerns that associativism cannot survive without making appeals to higher order moral principles that act as caveats. Although he acknowledges that some degree of reliance on these principles is necessary, he nevertheless thinks this to be "trivial and theoretically

²⁴⁵ But not for all of her followers. Massimo Renzo, for example, writes his own associative account that he has no issue as recognizing as quasi-transactional. It is really a multiple-principle account. See M. Renzo, "Associative Responsibilities and Political Obligation", *Philosophical Quarterly*, Vol. 62, No. 246, pp. 106-127.

uninteresting”.²⁴⁶ Horton consequently contends that there is such a thing as a “natural duty to perform ones associative obligation”, which to his mind confirms membership in the political community as the unique source of an associative political obligation, even when a principle of justice with clear restrictive powers is invoked. Both of these claims are profoundly bizarre. Aside from the fact that this “natural duty to perform associative obligation” is theoretically and methodologically confusing, there is nothing trivial about the necessity of appeals to justice: insofar as they are necessary they obviate parasitism, at best; at worst they illustrate the redundancy of associativism and the theoretical superiority of a straightforward natural duty of justice account.²⁴⁷ The failure of CO1A_{sufficient-normative-strength} and CO1B_{non-degeneration} are definitively confirmed. Horton’s account remains as unsuccessful as it was before.

Conclusion

In the wake of this analysis it should be obvious that associative theories are plagued by systemic faults that prevent them from achieving normative justification. Their most basic assumption – that all presumed duties held pertinent to the role of citizen are justified by the position itself – discourages the sort of enquiry that could reveal not only that behaviours within these relationship can, and do, require explanation, but that actions or inactions can be, and most likely are, the prompts of higher order moral principles corresponding to natural duties. Associativism ignores the possibility that role obligations do not flow (always) from the role itself but are derivative of the higher order moral standards that apply and regulate the practice. This error is congenital and pervasive, and in these conditions it will never not be an issue for associativism. The normative strength condition (CO1A_{sufficient-normative-}

²⁴⁶ J. Horton, R. Gabriel Windeknecht, “Is There a Distinctively Associative Account of Political Obligation”, *Political Studies*, Vol. 63, 2015, pp. 903-918, p. 913.

²⁴⁷ Horton’s last paper deals with Scheffler’s distribution objection that questions if our relationships “should give rise to a distribution of responsibility that is favorable to us and unfavorable to other people ... After all it may be said the effect of such a distribution is to reward the very people who have already achieved a rewarding personal relationship, while penalizing those who have not?”. See S. Scheffler, “Relationships and Responsibilities”, *Philosophy and Public Affairs*, Vol. 26, No.3, 1997, pp. 189-209 and Scheffler’s *Relationship and Responsibilities*. Horton’s strategy is to argue that when associativists cannot avoid the claims of the distributive objection, they will have to accept that they are right, but to an extent that is not very damaging. See J. Horton, R. Windeknecht, “Associative Political Obligations and the Distributive Objection”, <http://www.fupress.net/index.php/pam/article/view/18161/16879>.

strength) is not met, therefore, because the force and even existence of the ground are, at least, overestimated.

The other most problematic element of associativism is its practice of invoking other principles – typically justice – in order to sanitize or reinforce its argument without then considering the normative consequences of such inclusions. More often than not, this practice has justified opinions that their claims could be better arranged in an account of the moral requirement to obey as conducive to the satisfaction of a natural duty, the more straightforward route with a clear, single ground of obligation capable of sustaining the normative load; at other ones, identical questions are brought about by their argument being reinforced with contentions that bear a strong scent of transactionalism. Horton dismissed this as theoretically uninteresting. When the issue is justification, however, what could be more interesting than your chosen ground's inability to sustain? Associativism is guilty of parasitism that signals a structural issue of degeneration discoverable at every step (CO1Bnon-degeneration).

These are the two main complaints. There are of course more specific misgivings, such as those triggered by Gilbert's mysterious view on the joint commitment in walking as paradigmatic of the citizen-citizen relationship, Horton's brush with utilitarianism, the opinion that attachments are determinant to political obligation, the maximally overstated claims on the effects of citizenship on identity formation, and so on. To these faults in practical execution can be added theoretical ones, such as the arguably uninteresting (sic!) discovery of this category of political duties that straddles the gap between bona fide duties and orthodox obligations, and Wellman's point that associativism is more akin to virtue ethics than to a justificatory narrative on moral duties.²⁴⁸ This is not to say that associativism, as an opinion about integrated selves or about group formation and persistence, or even about the duties and responsibilities we have in virtue of being role-occupants in meaningful relationships, is of no value. As a paradigm of political obligation specifically, however, because of the litany of issues described in this chapter, of which the structural issues mentioned are crucial, associativism does not and cannot account for the moral requirement to obey the law; what ties compatriots together in compliance is obviously not the citizen role that birth assigned them. Its structural faults of

²⁴⁸C. H. Wellman, "Associative Allegiances and Political Obligation", *Social Theory and Practice*, Vol. 23, No. 2, 1997, pp. 181-204, pp. 187-188.

confusion (CO6), parasitism (CO1A) and degeneration (CO1B) condemn associativism, which therefore necessarily fails.

In the next chapter I deal with the response to associativism's failure, namely the renewed interest in natural duty justifications that aim to explain obligation as the predicate of *qua* human bonds, a departure from the classical way of conceptualizing the moral requirement. I show that this other-side-of-the-coin effort to extract a political duty from a broader one whose satisfaction is supposedly contingent on the performance of acts of submission is similarly pervaded by structural faults, of imprecise content and, for the first time, of improperly justified particularity.

Chapter IV: Natural Duty Accounts; Authority without Political Obligation

In the third chapter I have shown how attempts to justify the moral requirement to obey on a non-voluntary principle as political obligation-associativism miss the justificatory goal due to structural faults of confusion and degeneration brought about by a systemic inability to ground duty clearly in roles and membership, a practice of normative supplementation whose effects are consistently improperly measured, a proclivity towards considering attachments to be generators of obligations of the magnitude of the moral requirement to obey, and a general reluctance to consider the part played by higher order moral principles in their narrative.

The failure of associative accounts of the moral requirement to obey to excite and garner much support in the field marked the decline of *political obligation* as *the way* to approach the moral requirement to obey the law, and led to its eventual replacement as the ordinary non-voluntary way to approach justification with natural duties accounts ready to argue for political obligations as the predicates of duties. Of course, it was much earlier, with Rawls, that political theory was first introduced to the idea of conceptualizing the requirement to obey as a way to satisfy a natural duty one has *qua* human, rather than as an obligation one has *qua* agent or member. At that time, however, scholarship had still been heavily invested in finding an answer that, if not fully voluntarist, was at least somewhat inclusive of choice. When neither those efforts nor associativism yielded the desired results, a re-examination of Rawls' suggestions was thought to be in order, especially in the new context where previous misgivings about non-voluntarism were set aside. This orientation came to represent the new majority opinion, surpassing the number of scholars who opted for one of the other alternatives, by embracing a multi-principle account of the requirement, adopting the political authority without political obligation middle ground or joining in the defence of philosophical anarchism.

In this chapter, I examine natural duty and authority without political obligation accounts – the two theoretically interesting and significant responses to the perceived disappointments of classical *political obligation* justifications – in order to

deliver blanket criticisms (allowed by a possibility to fault these arguments along identical lines) and to show that the requirement to obey is not something that they can vindicate either. In the first part, I explain the main differences between duties and obligations and the justifications they inspire before examining a cross-section of natural duty vindications and isolating their main errors. These are discovered to be an across-the-board inability to defend obedience as the unique content of the duty and to morally vindicate particularity, coupled with more individual errors such as mistaking the justificatory threshold for political obligation for the one of authority, (Stilz), an excessive normative reliance on a weak argument from democratic practices (Christiano), or a practice of sourcing obligation in a duty that arises from situations of urgency that is incomparable to average political life (Estlund, Wellman). Then, in the second part, I perform an analysis of Kantian/functionalist accounts of authority without political obligation explanations as part of the responses to the observed incapacity of *political obligation* and natural duty accounts to achieve their intended goal; I find them interesting – as far as accounts of *de facto* authority go – but seriously flawed, insofar as they exhibit a similar powerlessness in accounting for the supposedly special and unique relationship between a state and *its* citizens. Finally, I conclude that it is time to move on from all the lines of argument explored, something that now can be done from a position of superior knowledge about the problems a novel account should navigate or resolve.

In spite of their shared goal of justifying the moral requirement to obey the law, natural duty accounts are not identical to *political obligation* explanations. They are rendered so by the fact that they are genetically different from the latter, even though the level of differentiation has somewhat diminished from the time of their first introduction. In the late 1970's and 1980's political theorists made a firm distinction between the two and used the concepts with rigour. With the advent of non-voluntarist theories of political obligation, however, and the general ensuing laxity in the usage of the vocabulary of duty/obligation (recall here R.B. Brandt in "The Concepts of Obligation and Duty" and H.L.A. Hart in "Legal and Moral Obligation" explaining to us that the two are not identical) the two began to share

some of their life blood, or at least appear to do so.²⁴⁹ Aside from perceived overlaps and communal purposes, however, natural duty accounts and political obligation justifications differ significantly. A primary distinction is that while *political obligation* accounts treat obedience as an end in itself, natural duty ones seek to discover some duty (one has *qua* human) to whose satisfaction the requirement to obey is conducive. The latter are models that make an appeal to the just nature of the state, to moral agency, to “original positions” from which principles could be extracted, to urgency or to some superior normative consequences flowing directly from respect in order to explain obedience, something that settles them with the task of showing the fulfilment of that duties to be genuinely and exclusively contingent on compliance. Both have problems in demonstrating factuality, but natural duties struggle with particularity whereas *political obligation* struggles with generality; the first has issues narrowing its field from the whole of humanity to a specific citizen body, whereas the second has problems expanding obligation so as to include more than isolated cases. Natural duties accounts are also typically concerned with making some *big statement* about the agent or about the state. *Political obligation* justifications seldom do this, focusing instead on the connections or interactions between parts as opposed to on the parts themselves. In these conditions scholars should – and almost always do – make a firm commitment to defending the moral requirement to obey as one or the other (only Rawls was able to detect both simultaneously, insofar as he held people to have a natural duty to obey and some to have political obligations springing from a voluntary act).²⁵⁰

Many theories are grouped under the heading “natural duty accounts”, with Rawls ubiquitous natural duty of justice justification being by far the most famous. Wellman’s Samaritan account, Stilz’ explanation based on the state’s provision of equal freedom, or duty of respect paradigms, all fall under it; even some who do not claim to lie within this category – such as Estlund’s normative consent – arguably do. They achieve various levels of success but it is undeniable that they come at least as close to justifying the moral requirement to obey as their more successful counterparts seeking to validate it on *political obligation* interpretations; cogency is most definitely not something they struggle to attain.

²⁴⁹ R.B. Brandt in “The Concepts of Obligation and Duty”, *Mind*, New Series, Vol. 73, No. 291, 1964, pp. 374-393; H.L.A. Hart, “Legal and Moral Obligation”, *Michigan Law Review*, Vol. 73, No. 2, 1974, pp. 443-458.

²⁵⁰ See J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971, pp. 114-115.

In the next pages I examine the three main types of natural duty accounts that are discoverable in the literature: justice, respect and samaritanism/urgency. Analysis will reveal the great merit (and advantage) of natural duty accounts to be their doing away with all vestiges of voluntarism without provoking much metaphysical nausea. Even devout voluntarists such as Simmons seem to be infinitely less aggravated by their rejection of will and its consequences than by the one performed by associativists, for example. Natural duty accounts manage to achieve this by making the prerequisite of obedience something owed by all humans in virtue of their own humanity to states that are just, justice delivering in an inclusive manner or, at the very least, providing some indispensable good or service. When starting from these assumptions the task then becomes tapering this duty from all moral agents to any just/good/useful state to some moral agents to their specific state, a task easier than demonstrating the consent of all, the benefaction of all or the community attachments of all. Easier however has not so far meant achievable. From as early as Rawls' own enunciation of the natural duty paradigm it became obvious that issues of content and particularity will unavoidably arise.

Duties of Justice

In the class of natural duties whose existence and content are not contingent on deliberate acts performed by their agent, and that are not owed to specific groups but to individuals generally (which includes aid, respect, non-injury²⁵¹) Rawls discovered a natural duty of justice. He describes it as a two-part duty:

“From the standpoint of the theory of justice, the most important duty is that to support and to further just institutions. This duty has two parts: first, we are to comply with and do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangement when they do not exist, at least when this can be done with little cost to ourselves”.²⁵²

²⁵¹ Rawls, *A Theory of Justice*, p. 114; p. 137.

²⁵² *Ibid.*, p. 337.

The first part of this duty is the political one whose content is held to be political obligations. This is problematic in two important senses that, on their own, preclude a conclusion that Rawls' account justifies obedience.²⁵³ Firstly, there is the readiness to assume that the content of a supposed natural duty of justice need necessarily be obedience towards the law, i.e. that justice is inevitably contingent on the performance of the instructions in law and cannot be achieved through means other than it. Rawls believes that the realization of justice imposes compliance with the states' legal rules. When the issue in question, however, is the justification of obedience, rather than justice simply, this needs to be shown to be true by excluding all other behaviours – ranging from piecemeal acts of obedience to acts of disobedience to alternating performances and, more importantly, behaviours and acts that do not belong to this category of submissive performances – as potentially or substantially conducive to the realization of justice. The problem here is not whether or not justice is, on average, likelier to be achieved through practices of obedience than through disobedience, but that the argument from achieving it may allow for more disobedience than it intended to permit or for “other” responses; in other words the account may settle us with a duty to behave justly, but it is not obvious that behaving justly necessarily and unequivocally means complying with the rules set by institutions that are held to apply to us. For this to be true, disobedience, and anything that could fall under the “other” heading of possible or suggested just behaviours, would need to be demonstrated to be morally impermissible. To be clear, the issue is not with the proposition “compliance leads to justice” or the correlative that justice required a measure of compliance but with the implied statement that justice can only be achieved through particularized compliance. Rawls does not prove permanent, uniform, exclusive compliance [with the laws of applicable institutions] to be the unique, morally correct way to achieve the justice with which the state is preoccupied, meaning that anyone that could defend disobedience or behaviours other than particularised compliance as conducive to justice would be excused from political obligation. So Rawls's account fails to observe ~~CO4~~^{CO4}precise content.

²⁵³ Other criticisms are possible, including questioning why Rawls kept the first part unqualified but presented the second as a qualified duty of charity (A. J. Simmons, “The Duty to Obey and our Natural Moral Duties”, C. H. Wellman, A. J. Simmons, *A Duty to Obey the Law: For or Against?*, Cambridge University Press, Cambridge, 2005, p. 157) or citizens' general ability to engage in the evaluative performances that would indicate to them a requirement to comply or the necessity of an effort to produce foreign change.

Secondly, Rawls' account establishes no particularity for his duty of imprecise content. Not backed by a proper explanation, the phrase "apply to us" is, at best, empty and at worst morally nauseating. Rawls himself offered no moral reasons for this restriction in application and corresponding submission. This leaves open two options: a) Rawls sees geographical proximity as reason sufficient and permissible for districting, as Waldron later suggested when he attempted to limit compliance to a single set of institutions by restricting the range of the principle on the basis of proximity to groups of insiders "to whose conduct, claims, and/or interests the requirements of [the principle] are supposed to apply",²⁵⁴ or b) Rawls sees birth within a jurisdiction as determinant to people's basic set of moral rights and obligation, which is more likely given Kant's influence on him. Both are strongly problematic, insofar as they are equally inconsistent with our common moral opinions and understandings and allow for great potential to morally wound. As far as birth is concerned, it is very tempting to ascribe superior moral consequences to it because of the moral and religious significances we generally attach to the event itself. By doing this, however, we are actively impeding realizations that there are no obvious and compelling reasons why we should consider it capable of independently settling us with duties of this kind; associative duties (not of the magnitude of obligations though) and duties held in virtue of humanity, yes; but not political submission to non-natural institutions with claims to authority that are intelligible but not obvious. The same can be said about geographical juxtaposition. Replacing birth with "dropped by the stork" or proximity with "1000 km in any direction as the crow flies" allows us to better understand the failings of these contentions. "If you have been dropped by the stork within the jurisdiction of Albania therefore you are morally required to obey its laws" or "if you've been dropped by the stork within 1000 km NSEW of the Duma" do not seem particularly compelling statements in favour of particularized obedience, either as the content of political obligation or as something which *de facto* authorities may justifiably claim. This is not trivializing; this is using

²⁵⁴ J. Waldron, "Special Ties and Natural Duties", *Philosophy and Public Affairs*, Vol. 1, No. 22, pp. 3-30, 1993, p. 13. Waldron ran into a very Nozikian problem when he states that what distinguishes insiders from outsiders is their "acceptance" of an institutions' [alleged] right to "administer" the principles of justice and of their duty to refrain from sabotaging the activities of institutions.²⁵⁴ In doing so Waldron introduced a strong element of consent into his argument, effectively making his supposed natural duty of justice theory into a multi principle theory that not only still disappoints in explaining why we are required to go along with something that it is just, why there can be no alternative supply and why claims over the right to administer the principles within a certain territory are legitimate, but also introduces the added issue of absence of evidences of consent.

semantics to show that words to which we instinctively assign special substance do not imply a necessarily correct and persuasive argument for restricted obedience. As such, ~~C6~~particularity fails and so does CO3precise-districting/inclusion.

Demonstrating what makes the relationship between a state and those held (internally and externally) to be its citizens is something that Rawls is not able to perform successfully, therefore making any and all limitations placed on the scope and application of the rules of a legal system – and of justice, implicitly – not morally special or correct in any obvious fashion. Later Rawlsians faced the same challenge and failed identically, similarly precluded by a set of beliefs that include a conviction that there is a moral duty of state entry brought about by its being the supposed sole avenue towards the generalized realization of justice affecting all, and a belief that our moral rights and duties, including those that are most elementary, are determinately influenced by the legal jurisdictions into which we are born. Particularity, which, in the context in which natural duty accounts operate, is a big question of privilege awarded to the state to impose on some and exclude others, will be their undoing, alongside the recurrent structural issue of imprecise content.

Decades after Rawls' original defence of a natural duty of justice, Anna Stilz delivered a very similar construction explaining political obligation as predicated on a duty of justice understood in a more specific sense. In her 2009 *Liberal Loyalties*, she makes the argument that the democratic states' political authority correlative to political obligation springs from its singular ability to provide its citizens with the good of justice understood as equal freedom.²⁵⁵ To her mind, the non-instrumental value of the cooperative efforts of citizens working with one another to secure justice [as equal freedom] is enough to justify their particularized allegiance towards their institutions. Her theory owes much to Kant and Rousseau. In Kantian fashion she first contends that the state is required if justice is to be attained; this requirement is a direct consequence of the supposed facts that states 1) determine the nature, scope and content of rights, 2) are solely tasked with their imposition (freedom as independence is maintained because our having rights is in no way dependent, predicated upon or "up to" the will of others), and 3) have a correct claim to the use of coercion to award rights and impose obligations for all and on all. In doing these, states remain at all

²⁵⁵ A. Stilz, *Liberal Loyalty: Freedom, Obligation & the State*, Princeton University Press, Princeton, 2009, pp. 27-57.

times, to her mind, aware of the general will. They demonstrate this by ensuring that everyone has a say in the procedural generation of the rights that will apply to them.²⁵⁶ The states' ability to deliver justice in the form of equal freedom and universally applicable rights, however, is only enough to establish the authority of a state. Political obligation is a more complicated affair in Stilz's account, considered to be something all citizens owe insofar as they are personally responsible for the right and ability of other citizens to enjoy their political entitlements, of which the one to equal freedom is the most important. In these conditions, political obligation appears to be both the content of a duty of respect (or of a duty of justice mimicking a duty of respect) and of a duty to be actively involved in the democratic procedures of the state. Stilz, therefore, sets for herself the task of validating "democratic solidarity and civic allegiance". She thinks citizenship to be in itself proof enough of these two, without needing to appeal to "background commonalities of language, ethics or culture".²⁵⁷ She bases her reasoning on a conviction that citizen solidarity is created and sustained within every state by two models of political education, the freedom model and the cultural model, which inform rational citizens that their enjoyment of rights and freedoms is contingent on the existence of the state and the conducive actions of their compatriots, and which guide them towards a sense of solidarity and identification with one another and the state.²⁵⁸ Then, in the final pages of her book, Stilz shapes this sentiment of identification as a commonality in purpose, in this case the achievement of justice in a democratic state in whose procedures they are all involved, whose offered packages of rights they all respect, whose laws they all obey in order to support it.

Stilz's argument is compelling. In theory, it shows obedience to be the necessary means of nourishing a special relationship between state-individual citizen-citizen group tethered together by a just provision of rights and freedom as independence. The problem with her account, as with most arguments owing to Rousseau and Kant, is that its claims are far broader than what the argument can actually defend. Stilz gets further than most, in the sense that her contentions about the state offering equal freedom and rights arguably could justify the existence of *some* (quantity wise) state. This state would, however, be a minimal one – or at least

²⁵⁶ Stilz, *Liberal Loyalty: Freedom, Obligation & the State*, pp. 57-85.

²⁵⁷ *Ibid.*, p. 25.

²⁵⁸ *Ibid.*, chapter V.

smaller than concrete ones – by which I meant that whatever it would do or offer beyond what is *stricto sensu* necessary for equal freedom would not be covered by her argument, and all corresponding additional claims on individual freedom would be unjustified. In other words, she does not show that we need as much state as we presently have to endure in order for justice and equal freedom to exist;²⁵⁹ it is very possible that there is demand for a state (although alternative supply remains a valid objection), but there is ample room to argue that people are being supplied with more than they need. But this is only a first objection. The main misgiving her account triggers is that it reads like a vindication of obedience as the appropriate response to the many benefits and services the state bestows on us citizens without questioning why or how “we”, and only “we”, are the ones that ended up on the receiving end of this equation (C6particularity and C03precise-districting/inclusion), or if these “gifts” have consequences equal to the magnitude of political obligation (and they are, in some sense, gifts, given that (a) no one asked for them and (b) even if they had asked, after some meaningful and morally correct process of consideration, that does not serve as proof that only their state could provide, that they should continue to ask only their state, and that alternative supply to their state provision is forbidden). As far as political authority is concerned, she defends the merits of the state while omitting to provide an explanation that would legitimize these non-natural roles [states and citizens] parties in this relationship appear to have assumed. Stiliz, therefore, provides an account of authority with obedience as something owed to a well-functioning state equally concerned with the interests and well-being of its citizens. While her narrative may justify some claims to obedience it does not, however, manage to say something concrete about a *duty* to obey arising from belonging to a particular group: to establish authority it is arguably sufficient to show that the claim that the state provides something valuable in an unobjectionable fashion is believable or correct; to establish political obligation, however, a group of people has to be revealed to owe obedience, exclusively, to a specific state whose claims are not affected by its performances or the results of interpretation or evaluation. A state in possession of a power right against its citizens is not a state that *earns* their compliance. Nothing in her account bridges this gap. Her discussion on citizenship and the two educational models might explain why people may feel/think they have to obey, but it does not

²⁵⁹ Or even the state at all, if inclined to agree with Simmons’ suggestions that other arrangements could secure the advantages of political living, including equal freedom.

demonstrate that their intuitions are real and correct, nor adds to the cumulative case for justification, since thoughts and convictions cannot be said to trigger obligations of the kind we are interested in (also ~~CO5non-generational assumptions from attachments~~). This is a consequence partly of her Kantian convictions, partly of a conviction that solidarity will carry at least some of the normative load and partly of an obfuscation between questions about the origins and sources of political obligations and questions about the defensibility of authority: justifications of the moral requirement to obey are not about the good reasons, including moral, we may have to obey the state, or even about the justifiable claims the latter might make of citizens in light of its provision, they are about showing that when moral entities have their initial normative status changed so as to be put in a relationship of subordination to a state, they and only they owe obedience and only obedience. The questions “why are people bound to obey” and “do state actions, functions, structures and performances justify claims to issue allegedly authoritative commands” are not identical; the first imposes a requirement to vindicate that a transfer of rights has occurred; the latter presupposes the inferior task of defending a pretence.

As such, Stilz does not manage to make that difficult leap from showing that something is good/valuable/just/useful/etc. to showing that the good, valuable, just, useful thing actually produces a factual duty. Hence her account arguably gets stuck somewhere halfway between an unobjectionable defence of a thesis of authority and a natural duty of justice paradigm more qualified than Rawls’ original formulation. In this latter direction however no real progress is made either. The solidary, civic-minded behaviour expected of burdened citizens is yet again not obviously obedience (so ~~CO4precise content~~), as other performances may bring about rights and equal freedom for all. Nor does she make any progress towards confirming particularity as overlapping with jurisdiction. She assumes obligation to follow border lines without considering the possibility that her account might render them morally impermissible, that in the absence of demonstrated restrictions, borders excluding outsiders from better functioning democratic states with superior deliveries of rights and freedoms – or democratic states altogether – are morally wounding, begging a question why our fortunate co-citizens in receipt of equal consideration are more entitled to our submission than B, the unfortunate outsider who lives in a less just state. Moral discourse typically holds victims to be more entitled to whatever action of ours could render them better off than those who may be entitled to it on considerations of

proximity, association, etc. In these circumstances, in the absence of a proper justification for particularity, it could be argued to be more morally appropriate to consider obligation and obedience on a case-by-case basis, with those living in a context of superior justice having a weaker claim to it. It could be retorted that particularity is a question of ability and reach – there is only so much one instantiation of compliance can achieve and only so many it can genuinely affect – making it such that those likelier to have their justice and freedom determinately influenced by one’s actions, supposedly our compatriots, are those most entitled to it. This is a weak charge not dissimilar to Waldron’s argument from proximity. The fact that I have to do X but I can only do X towards A but not towards B does not mean I have to do X towards A exclusively – as particularity is supposed to ensure for political obligations – but that poor, unfortunate soul B is being short-changed. Ability and proximity do not have morally permissible restrictive effects on moral requirements; just practical ones on discharging. Thus, while they may render instances of non-performance excusable, they do not actually narrow down the moral requirement, and there is always the possibility that the ability to discharge X may not necessarily coincide with borders – it could be less inclusive or more inclusive. This is, therefore, an improper argument, as are those from the educational model and the alleged commonality of purpose Stilz introduces: the first could be rejected as a claim from brainwashing, *pace* Simmons, whereas the commonality of purpose assertion is at least as fictitious as cooperation. Stilz’s undemonstrated obligation is not particularized.²⁶⁰

This failure to account for particularity (€6), coupled with the fault of imprecise content (€4) and the underlying issue of having missed the justificatory mark for political obligation for the lower one for political authority obviate Stilz’ inability to explain the moral requirement to obey. Thus, Stilz’s citizens have duties that range between a weak duty not to interfere to piecemeal ones whose content may mimic the one of full-on political obligation but are not the sweeping obligation of citizens whose normative situations have been changed to such a degree that absolute submission is unchallengeable. They may need, and have reasons, to comply, and they may do so consistently, but their submission is a fragmented, specific time-to-

²⁶⁰ In fact, while her two educational models would likely please Rousseau greatly, they (mostly the second one) would vindicate Simmons’ telling associativists and earlier natural duty of justice theorists that they are using manipulation and indoctrination to place limits on people’s freedom. Stilz walks right into that trap of predicating obedience on beliefs.

specific-rule affair corresponding to a cumulatively vindicated but improperly restricted claim-right pertaining to a political authority that is not fully legitimate.

Duties of Respect

The idea that political obligation is the content of a duty of respect resurfaces at various time in the history of the thought on authority and obligation and is generally accompanied by a conviction that this duty can only be fulfilled within the logic of democratic states which presuppose collective decision-making processes that award equal concern to the interests of citizens and equal respect to their various opinions before reaching a decision on the basis of a majoritarian principle.²⁶¹ In this context, acts of disobedience are morally wrong insofar as they constitute a clear refusal to give the opinions of others similar consideration to one's own, thus robbing them of respect. Christiano and his work stand out in this category.²⁶² According to him, justice – understood as the nonbiased respect for and advancement of every citizen's interest as the highest common good – can only be achieved by a democratic state that negotiates conflicts arising from cultural disparities, cognitive dissonances, moral arguments and general differences in interpretation in order to produce, through democratic procedures, a functional understanding of the concept that is acceptable to all and that, as mentioned, awards the interests of all equal consideration.

Stricto sensu this account of political obligation as the content of a duty of respect obligation (Christiano also has an account of *de facto* political authority and one for the moral requirement to obey), is not suitable. To begin with, it runs into the two already familiar problems of content and application. Firstly, in spite of operating assumptions, it is not at all certain that the content and predicate of this duty of

²⁶¹ The idea of a duty of respect recurs often in the thought on authority and obligation. J. Waldron, talks about a duty of respect for the opinion of others which is satisfied in democracies because their procedures are most inclusive; see *Law and Disagreement*, Clarendon Press, Oxford, 1999. Stiliz also writes about respect – for others' rights and general well-being – in *Liberal Loyalties*, a duty that imposes going along with the demands of the state; Raz, at various times, writes about respect for law as something that provides some reason for action, including obedience, but that does not create an obligation *tout court* (*The Authority of Law*, pp. 258-260); and Philip Soper's duty of deference to law could also be inserted in this category, P. Soper, *The Ethics of Deference: Learning from Law's Morals*, Cambridge University Press, Cambridge, 2002.

²⁶² His argument is developed throughout a number of works. Most significant are T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*, Oxford University Press, Oxford, 2008 and T. Christiano, "The Authority of Democracy," *Journal of Political Philosophy*, Vol. 12, No.3, 2004 pp.266–200,. Also see T. Christiano, *The Rule of the Many*, Westview Press, Boulder, 1996.

respect [cum justice] is obedience, permanent obedience, only obedience and only towards states that meet the formal features of a democracy. He offers no reason as to why respect could not be manifested through other means, including by disobeying; it is simply assumed that compliance is the only avenue to fulfilment.²⁶³ He runs then into the same issue of ~~C04precise content~~ as Rawls did, as we have no evidence that respect, as justice, is contingent on compliance with applicable law, exclusively. Secondly, in what proves to be a recurrent theme, the particularity requirement is not properly met, insofar as a general duty to exhibit equal concern/respect needs to be shown, and not presumed to follow state borders. As such, the considerable possibility of restriction being performed in a morally wounding fashion lingers, and this natural duty of respect justification encounters the same problem of application as Rawls' duty of justice, begging the question of why the interests and opinions of those placed on the same side of the border matter and compel more, morally speaking, than the opinions of those opposite; ~~C6particularity~~ fails then.

Besides these two, there are other issues as well, mostly having to do with the underlying propensity towards reductionism discoverable in the arguments that respect can only be exercised in democracies. Accounts like his invoke democratic assemblies and their just policy of pooling opinions and deciding according to majority intentions. But the fact remains that the democratic state presupposes no assembly of the kind that would allow these claims to be accurately made and a multitude of its institutions do not function on a majoritarian principle and thus cannot be said to take into consideration the preponderant opinion of the citizen body. So the argument, though not toothless, is blunt. Similarly, they elect to prioritize this majoritarian principle (or a principle of fairness instantiated in this majoritarian guise) without accounting for the fact that other principles could make competing and/or superior claims; this is a particularly salient issue for those that appeal to justice as well – there is a possibility, a strong one in fact, that respect would be better served by some other [than the majoritarian principle] higher-ranking, moral standard. In

²⁶³ The idea of a duty of respect recurs often in the thought on authority and obligation. J. Waldron, talks about a duty of respect for the opinion of others which is satisfied in democracies because their procedures are most inclusive; see *Law and Disagreement*, Clarendon Press, Oxford, 1999. Stiliz also writes about respect- for other's rights and general well-being- in *Liberal Loyalties*, a duty that imposes going along with the demands of the state; Raz, at various times, writes about respect for law as something that provides some reason for action, including obedience, but that does not create an obligation tout court (*The Authority of Law*, pp. 258-260); and Philip Soper's duty of deference to law could be inserted in this category, P.Soper, *The Ethics of Deference: Learning from Law's Morals*, Cambridge University Press, Cambridge, 2002.

addition, if we wished to test this hypothesis further by comparing and contrasting the efficiency of principles as conduits to respect (or justice) we could not, as no tools or guidelines for evaluations are offered. Nor is it clear if they are operating on a conviction that democratic excellence and the consequent ability to achieve justice are measured in terms of the consequences they produce or in terms of how perfected is their practice of awarding all opinions equal concern. The bottom-line remains, however, that it is not at all clear that the fulfilment of a duty of respect is contingent on democratic rules or on compliance, assuming here that considerations of respect are among the first that come to mind when the relationship in question is the one between citizens and institutions.

Moreover, while suggestions that democratic principles and procedures will help negotiate conflicts in a manner that will minimize, as much as possible, the proportion of those of dissatisfied ring true, they do not support his assumption that the good – understood as either the correct or the moral – will necessarily be achieved by these bodies more often than by other arrangements, political or non-political. Their accounts only inform that democratic assemblies will award equal respect in decision-making. There is no caveat that refers to some subjective or objective standards that could regulate or provide moral direction in decision-making: a monstrous decision achieved following a process of consultation with Hitler-like individuals is “just” and acceptable by their logic.

There are a number of issues with this claim about political obligations as being rooted in respect, then. As a purported natural duty account it exhibits the same two structural faults of imprecise content and unproven particularity as all others; the issues here being exacerbated by the inexact meaning of “respect” and by reservations triggered by implied claims that the obligation ends at the border. Restricting duties of justice or samaritanism or urgency on arguments from ability and proximity may be incorrect but the contentions themselves do enjoy a degree of commonsensical appeal, insofar as it is true that individual capabilities to perform acts conducive to their satisfaction are limited. The same cannot be said of respect, however, which – being a state of mind – is harder to restrict to a true and morally inoffensive statement that “respect for other’s opinions and interests is first and foremost a duty owed to compatriots whose satisfaction is predicated on uniform compliance”. Furthermore, the claims of democracy are of no help, their only effect being to strengthen suspicions of not moving beyond an account of authority without a correlative duty to

obey, the kind proponents of respect most often openly marshal in tandem with their argument for obligation.

Duties of Rescue

Among those that have defended a clear-cut account of obedience as the content of a duty pertaining to a situation of urgency, Wellman most stands out through his defence of a natural duty of samaritanism. Wellman shares Christiano's Hobbesian view on the world in the absence of a state as capable of imposing order and using coercion to bring about justice – the war of all against all – and consequently similarly finds the state to be a justifiably expensive necessity (Wellman is adamant that a coercive state is the only solution to the many violent problems of the state of nature); its costs may be heavy and burdensome, there is no denying that, but very much worth paying considering the alternative. This is the descriptive part of his account. Wellman was aware, however, that in order to justify obedience it is not enough to show that life within an order generating, just, political construction is superior to a life within the state of nature; Wellman does not make the mistake of earlier natural duty theorists who believed justice on the state's side automatically entailed obligation on the side of recipients. Instead, in order to manufacture a duty to obey, he introduces a duty of samaritanism, understood as a duty "...to help a stranger when the latter is sufficiently imperilled and one can rescue her at no unreasonable cost to oneself".²⁶⁴ This other-regarding duty justifies the use of coercion and the corresponding bind of obedience by invoking, not the well-being of the coerced/forced to conform with the law, but the well-being of those that may be harmed by another agent's refusal to submit or who would risk the state of nature if they were to disobey. The normativity of obedience therefore arises from this duty of care that permanently compels us to rescue one another from the state of nature by complying with the law, any refusal to submit equating to a refusal to perform our "fair share of the Samaritan task".²⁶⁵

²⁶⁴ C. Wellman, "Towards a Liberal Theory of Political Obligation", Vol. 111, No.4, 2001, pp. 735-759, p. 744. Also see C. Wellman, "Samaritanism and the Duty to Obey the Law," C. H. Wellman, A. J. Simmons, *A Duty to Obey the Law?: For and Against*, Cambridge University Press, Cambridge, 2005.

²⁶⁵ C. Wellman, "Towards a Liberal Theory of Political Obligation", Vol. 111, No.4, pp. 735-759, 2001, p. 749.

While Wellman's argument is thought-provoking, it also raises immediate red flags. Simmons, who co-authors a book with Wellman, identifies two important ones. First, he argues that Wellman miscalculates the costs of obedience. Although Wellman accepts that obedience towards the law is burdensome, he argues that the aggregate costs of collective obedience are significantly lower than the aggregate costs of collective disobedience – the state of nature. When comparing the two, he comes to what seems a reasonable conclusion that obedience, though taxing, is not overly expensive. Simmons believes this argument to be specious, in as much as it is not the collective costs of obedience/disobedience that interest us but individual ones, since the requirement to obey is always studied individually. His view is that disobedience is not at all expensive at a cellular level: the risk is never truly the state of nature – we cannot bring that about on our own – but, at most, some sort of legal sanction. His conclusion is that Wellman ought to have come up with a better way to calculate the costs of the Samaritan task, which may be infinitely heavier than he assumed.²⁶⁶ Secondly, Simmons also takes issue with the way Wellman conceptualizes this supposed duty of samaritanism. At first, this duty appears to be very similar to a clear-cut duty of rescue. When Wellman introduces an argument from fairness, however, this duty morphs into something more akin to a duty of charity. The problem with this is that duties of rescue and those of charity are quite dissimilar: duties of rescue are owed by all to all *qua* human and have a very occasional nature; duties of charity, on the other hand, are localized, owed to specific people (the ones that “deserve” to be treated “fairly”) and are more of a permanent fixture. Simmons believes that this indeterminate nature of the duty of samaritanism means that it does not have a proper, stable, answer to the question of particularity.

The first objection is indicative of Simmons' conviction that a good account of political obligation will show not only why people have to obey but will also illustrate disobedience to be morally impermissible even when not unfair or otherwise wounding. There are sufficient reasons to believe that, outside of an account of explicit consent or on the principle of fairness resulting from acceptance, none will manage this; this is simply asking too much. As for the second complaint, although a valid concern in the theoretical sense, it is not particularly poisonous. No matter what kind of duty samaritanism is, we know it to presuppose some sort of “salvation”,

²⁶⁶ A. J. Simmons, “The Duty to Obey and our Natural Moral Duties”, C. H. Wellman, A. J. Simmons, *Is There a Duty to Obey the Law?* Cambridge University Press, Cambridge, 2005.

which Wellman explains as being achieved through obedience towards the law. As such, if there are any issues with particularity they will not arise out of Wellman's failure properly to position his duty within the existing taxonomy.

More serious concerns here are that Wellman has not shown 1) ordinary politics to equate to a situation of crisis from which we have to rescue our compatriots (C7conformity) and 2) that obedience towards the law is the only way to do so (CO4precise content).²⁶⁷ We have no reasons to believe that bearers of duty might recognize day-by-day socio-political realities as occasions on the cusp of the disaster that is the state of nature, or have any instinct or intuition that obedience to the law is the way to alleviate the potential distress. Even if we assume with Wellman that these political realities are situations that suffer – or are in permanent danger of bringing about – duties of samaritanism [although there must be a degree of logical inconsistency in equating routine to occasions signalling the need for rescue], Wellman does not explain why obedience to the requirements in law is the exclusive method of “saving” everyone. The content of this duty of samaritanism is not obvious, and need not be submission to the law, and, if it were, it need not be either permanent or continuous. So, even on two generous assumptions not backed up by reality or evidence, Wellman's samaritanism seriously struggles to show that the moral requirement to obey is the heavy, uniform, generalized, duty we observe obedience to be (CO4precise content). To resolve this issue of coherence, Wellman appeals to fairness. But fairness is a dangerous path, as it gives his account too strong a whiff of transactionalism comfortably to claim a clear, single ground for the obligation to obey and membership in the natural duty accounts category (CO1Bnon-degeneration if not failed, threatened), and commits him to the morally dubious claim that it is fairer to rescue those that live within the same jurisdictional perimeter as ourselves. Both are very problematic. The first invites observations that fairness may be a more straightforward route to political obligation and questions about the possibility that, in this universe where arguments from fairness have been shown to be unable to sustain political obligation, Samaritan claims may be used as reinforcement; these bode well for Klosko and principle proponents, but are fatal to Wellman's contentions that

²⁶⁷ The first point brings about additional concerns. If we lived in actual situations of urgency would a state providing more than relief be justified, and would its claims to legitimate obedience extend farther than non-interference and what would be required for rescue? The obvious concern here is that Wellman's account could best case scenario only legitimize a minimal state's claim to authority without an actual obligation to obey.

samaritanism functions as a single ground of political obligation.²⁶⁸ As for the second assumption, it encourages doubts about the moral permissibility of excluding someone from something as important as salvation based purely on a simple argument from legal and geographical borders that are no more than historical accidents. Furthermore, while salvation is naturally restricted – I may owe rescue to all the drowning children in the world but only some are actually in my physical reach and therefore this duty is at its strongest towards them – this restriction need not necessarily reflect real life political districting: demanding obedience for those not genuinely affected (rescued) by my submission is a moral wound; not demanding it for those that could be affected (rescued) but are not taken into consideration because they are placed outside of the perimeter determined by borders is a moral wound. To conclude on this, besides a perspective on political life that does not mirror realities, and an undemonstrated conviction that samaritanism has as its unique content compliance, Wellman’s account also invariably creates the impression that no matter what criteria or arguments are used to restrict the duty to one state and *its* group of legal subjects, someone, somewhere, invariably ends up morally short-changed on an appeal to a weak – but not weakest – argument from physical ability and proximity (~~C3precise districting/inclusion~~ and *ceteris paribus* ~~C6particularity~~). Wellman thus delivers a justificatory narrative that runs into the typical faults of natural duty explanations, as well as into issues of non-conformity and degeneration.²⁶⁹

In conclusion, natural duty accounts thus reveal themselves to be plagued by a host of issues, two of which are structural faults poisoning their whole logic. Their proponents’ Kantian inclinations play a significant part in their readiness to assume the content of duties to be necessarily political obligation, and in their willingness to gloss over issues of particularity they think resolved or resolvable by ascribing moral

²⁶⁸ See G. Klosko, “Samaritanism and Political Obligation: A Response to Christopher Wellman’s ‘Liberal Theory of Political Obligation’”, *Ethics*, Vol. 113, No.4, 2003, pp. 835-840 for his opinion on how samaritanism can help the principle of fairness.

²⁶⁹ Renzo also notices this and argues that Wellman’s inability to justify the special relationship between X state and X citizen group is bound to create some moral wounds, particularly beyond borders. Interestingly, Renzo also makes a compelling claim that, by failing properly and unobjectionably to restrict this duty, Wellman opens himself up to charges that, at least hypothetically, disobedience towards a state law’s can have morally superior consequences, not only within borders but outside as well, thus negating his claims that disobedience always yields negative results and is morally impermissible. See M. Renzo, “Duties of Samaritanism and Political Obligation”, *Legal Theory*, Vol. 14, No. 3, 2008, pp. 193-217.

significance and consequences to birth or facts of life beyond what moral philosophy, especially the philosophy of political obligation, tolerates. The end results are what we have seen here: a blanket inability to show that presumed duties of justice, respect or rescue can only be satisfied by complying with legal requirements, and that instances of submission must necessarily break along state lines. Content (C04) and application (C03, C6), therefore, prove to be the two main liabilities for natural duty accounts, with rescue ones additionally struggling with a propensity to portray political life in a way not reflected in reality and with a choice to include an argument from fairness that ultimately sabotages them. Natural duty accounts, then, do not fare better than their political obligation counterparts because, in spite of their demonstrated ability to do away with voluntarism in a way not morally nauseating or triggering of opinions that limitations on freedom are routed in insufficient grounds, they are structurally flawed in ways for which there is, and cannot be, any rectification. In addition, even if a morally acceptable reason for restrictions in application were delivered, the issue of content would endure, it being impossible to exclude all behaviours but compliance under obligation as conducive to satisfaction. Natural duty paradigms are, to sum up, as permeated by structural faults as the previously assessed theories. Because of them, they will necessarily fail.

These authors' Kantian inclinations can be altogether blamed for their mistaking what constitutes a sufficient account of political authority with what functions as a valid account of political obligation. This mistake, however, also signals a recognized potential of separation between the two concepts that, for those who do not endorse the correlativity thesis, equates to a permission to defend justifications of political authority that do not correspond to a comprehensive obligation to obey. In the next section I address these median justifications, not for their potential to establish something correct about political obligation, but as derivative constructions still attempting to vindicate claims to obedience.

Authority Without Political Obligation

Authority without political obligation theses are products of political theorists that no longer endorse the orthodox view of political authority as tied to the existence

of a moral requirement to obey. They are some of the same scholars who, either separately, or in the same breath, also defended justifications of full-on political obligation: if for the latter they argued from a natural duty to participate in the provision of justice as equal freedom (Stilz), from normative consent (Estlund), from moral contractualism (Lefkowitz) or from a natural duty of respect (Christiano), in the direction of political authority they generally argue from the structures, functions and performances of democratic states.²⁷⁰ Consequently, these scholars adopt positions that invoke the good moral standing of our political systems, their deliveries of justice, or their fair and considerate decisions-making practices as arguments for obedience that mimics political obligation but is not actually it.

This practice of constructing separate narratives for obligation and authority is implicitly indicative of a belief that authority – correct authority with entitlements and claims to obedience that are, in important senses and to an important degree accurate – is something that can pertain even to universes to which political obligation does not. These scholars therefore operate on a belief that the inability to account for the moral requirement to obey does not deny the possibility of political authority or of obedience, obedience however that is not the content of a moral right against citizens, but the *legitimizable* (or legitimate in a reduced sense) claim of a certain type of political regime – a democracy.²⁷¹ Unlike classic accounts of political obligation that

²⁷⁰ See Stilz, *Liberal Loyalties*, chapter 2, where she argues about the democratic state as uniquely equipped to provide equal freedom. D. Lefkowitz (2005) resonated with Christiano's argument and claimed that democratic decision-making bodies have authority stemming from their knowledge and ability to settle disagreements as to what actions are morally necessary to be performed by collectives. See D. Lefkowitz, "A Contractualist Defense of Democratic Authority", *Ratio Juris*, Vol. 18, No.3, pp. 346-364, 2005. Similarly, in *Democratic Authority*, Estlund defends the opinion that democratic decisions are legitimate commands because they have "epistemic value" insofar as they are made collectively (pp.231-232) following an airing of reasons [for opinions on specific issues] and it is generally accepted that they lean towards being "good" decisions. Estlund insists on democracies' "modest" tendency towards just decisions (pp. 106-107; 160-163; 168) that reflect the local conception of justice (p. 169). Also see D. Estlund, *Democratic Authority: A Philosophical Framework*, Princeton University Press, Princeton, 2007, pp. 98-116; 159-183. Finally, Jeremy Waldron defended political authority as springing from democracy's ability to deal with disagreement (pp. 27; 41; 86). See J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999.

²⁷¹ Christiano writes in "The Authority of Democracy", p. 275: "Democratic decision-making on the issues in contention is the uniquely public way of realizing equality among citizens. First, democracy is a publicly clear way of realizing a kind of equality. It involves equality in voting power, equality of opportunities to run for office, and ideally equality of opportunities to participate in the processes of negotiation and discussion that lead up to voting.... interests in being able to correct for others' cognitive biases, being at home in society, and in having one's equal moral standing publicly recognized and affirmed ground the principle of respect for the judgment of everyone in society.....". Christiano has been defending this position from as early as *The Rule of the Many*, p. 35. Stilz writes in *Liberal Loyalties*, that the authority of the democratic state is a consequence of its functions: "First, it defines rights (protected interests) that apply equally to all; second, it defines these rights via a procedure that considers everyone's interests equally; and third, everyone who is coerced to obey the

presupposed no separate explanations of authority on the correct idea that a justification of obedience legitimizes institutional pretences of authority, these accounts view obedience as a statement to be reinforced, rather than verified, and present authority as the property of a well-functioning state – it is not that people owe obedience, it is that states are justifiably entitled to and deserve it. These accounts, consequently, do not ask why do people have to obey, but merely observe that they do, and seek to show that they should continue to do so. In concrete terms, this means that advocates of this position aim not to justify the transition from a free status to one in which we are bound, but to justify the political state as a given with *legitimizable* claims to our authority. This is no subtle difference: classic theories of political obligation sought to explain the circumscription of our pre-political autonomies. This group, however, aims to show that we have to go along with whatever [supposedly] authoritative decisions autonomy-limiting regimes impose on us without wondering what permitted them to bracket our autonomy in the first place. They are not explaining why Caesar is Caesar; they are merely telling us why it is right to give unto him, on the aforementioned argument from properly-performed services. Legitimate political authority corresponding to a moral requirement to obey is therefore the province of theorists of political obligation; *de facto* political authority corresponding to piecemeal obedience of these theses of political authority.

Insofar as obedience *per se* is concerned, this was a lateral move that exhibited neither the courage of those choosing to move forward with explanations of political obligations, nor the radicalism of those who turned to philosophical anarchism. But it was also a prudential move that endeavoured to show that the smouldering ashes of accounts of *political obligation* and the many doubts expressed about natural duty justification do not necessarily bury all acceptable and intelligible claims to authority.

Uniformly, these thinkers owe something to Raz. In “The Obligation to Obey the Law” he writes that while there may not be a general obligation to obey the law,

laws has a voice in the procedure”, p.78. Estlund defends epistemic proceduralism as a source of authority: “the bindingness and legitimacy of the decisions are not owed to the correctness of the decisions, but to the kind of procedure that produced them... Democratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions...”, D. Estlund, “Epistemic Proceduralism and Democratic Authority”, R. Geenens, R. Tinnevelt (eds.), *Does Truth Matter? Democracy and Public Space*, Springer, Dordrecht, 2008, pp. 15-28, p. 20. Waldron thinks (*Law and Disagreement*, p. 117) that the authority of democracy springs from its refusal to allow procedures designed to deal with disagreements to award more weight to some sets of interests than others.

obedience can be seen as being occasionally made mandatory by alternative factors having to do with the abilities and functions of law and institutions, including replacing dependent, primary reasons with secondary ones on a [believed] claim that this will render citizens better off. Inspired by him, scholars in this new category have argued that certain aspects of states will award them authority.

As mentioned before, the idea that states may have the power to control even citizens not obligated to obey is no way an incoherent position, but a mere denial of the correlativity thesis with which we have grown accustomed. We should also, however, never lose sight of the fact that authority on account of political authority is not authority to the same power or degree of intensity as authority on a justification of political obligation. At most, a successful account of the former could be said to show obedience and claim to it to be intelligible, and somewhat legitimate and justifiable in a weaker sense. Connectedly, the obligation to obey of a person burdened with political obligation is much stronger than the duty of a subject of mere political authority: the former is under perfect bound, the latter has to obey in a real but sporadic, localized and piecemeal fashion; the former is a continuum, genuinely permanent and uniform, the latter a sum of instantiations of obedience. Much of the same is true of the other side of the coin. Authorities correlative to an obligation to obey are bearers of a power right. The others orbit around a claim-right (which may still be a too strong description) and any attempts to designate their impositions as moral could, and should, be met with strong objections.²⁷² This differentiation is not a practical one, however: whether we obey because the state is in possession of a power right or we because of the balance of reasons, moral principles or practical considerations, compliance “happens”. The distinction is instead moral and theoretical, with the accounts discussed so far coming up on the losing side that is the one devoid of political obligation.

Having said this, even with this lowered goal, these accounts generally fare dubitably. They consistently struggle with the inability to show a particular set of institutions to have authority over one specific portion of land between international borders (referred to as the districting problem; it mirrors the old application problem with Rawls) and to explain why only a specific group of people owe obedience to a particular state for reasons that have sufficient moral charge (referred to as the precise

²⁷² See M. Kramer, “Requirements, Reasons and Raz”, *Ethics*, Vol. 109, No. 2, 1999, pp. 375-407.

inclusion problem).²⁷³ These accounts obviously do not have to meet all the requirements set for a justification of political obligation; but insofar as authority and obedience continues to materialize as a one-on-one relationship between a citizen and *its* state, it still needs to be shown to be correct in a minimal morally unobjectionable sense.

These inabilities derive from the manner in which these scholars interrogate authority, and from that same set of Kantian assumptions we have seen sabotage natural duty of justice explanations. As Simmons points out,²⁷⁴ [some of] these authors consider state entry to be a moral duty people owe to others insofar as states are believed to be indispensable to social order and the provision of justice.²⁷⁵ Assuming here that these are true, the practical experience of citizenship looks rather different, however – it is not entered, it is a consequence of birth. “Entry” presupposes some measure of intentionality and deliberateness and is an act in the proper sense, whereas the acquirement of citizenship does not and is not, for the overwhelming majority of people, something over which they have any control. State entry, in the sense these scholars intended, thus seems a reality only for immigrants, who arguably hold full political obligation on consent. Nevertheless, even if entry were a reality for all adult citizens, nothing imposes a duty to enter the same state as the one around us – a duty to enter a state is not one that has to be discharged on considerations of proximity. Nor does it mean, alternatively, that we have to enter one of the other existing states; we could opt to form our own somewhere in an unclaimed wilderness (a new issue of alternative supply) or even cobble up one with pieces from existing ones. Farfetched as these opinions may sound, Simmons is correct in pointing that “nothing at all follows about the rights of existing states to use coercion to limit the ways in which we may discharge this obligation...”.²⁷⁶ An alleged moral duty to enter a state on my part does not entail a duty to enter the one in which birth occurred. A proponent might counter-argue that, even though states do now allow the redrawing of borders, they allow movement across them and so anyone that stays has submitted. This is an argument made before by tacit consent as residence advocates and runs into identical difficulties: too hard a choice to be real, too little awareness of its existence.

²⁷³ Terminology shared by Simmons, who discusses over and under-inclusiveness in “Democratic Authority and the Boundary Problem”, *Ratio Juris*, Vol. 26, No.3, 2013, pp. 326-357. This article is reprised as chapter 2 of *Boundaries of Authority*, Oxford University Press, Oxford, 2016.

²⁷⁴ Simmons, “Democratic Authority and the Boundary Problem”, pp. 332-334.

²⁷⁵ Stilz, *Liberal Loyalties*, pp. 37-53; Christiano, “The Authority of Democracy”, pp. 237-238.

²⁷⁶ Simmons, “Democratic Authority and the Boundary Problem”, p. 337.

This duty, if existing, therefore establishes nothing obviously correct about the territorial rights of states or about political authority as something that we have to accept and comply with.

The other problematic assumption repeatedly employed throughout these accounts is that government is a datum that has to be taken as such. To Simmons' mind there is an important element of jumping the gun. Kantian/functionalist attempt to vindicate the rights of properly functioning, justice delivering, majoritarian states without pausing to explain the formation of government and to question what authorized them to restrict autonomies along the lines we see on maps. This amounts to a districting problem, which invites interrogations about the moral claims to existing jurisdictions and a concern that the problems of over- or under-inclusion could be thought resolvable by an argument from superior competence. In this second direction, Simmons blames these accounts for their self-serving, wilful historical ignorance that allows them to argue for territorialized control without accounting for the fact that borders and districting are the results of centuries of injustice. This is more than an ethical misgiving about efforts to paper over historical aggressions with arguments from impartial efficiency;²⁷⁷ it is a practical preoccupation with their failure to install any safety measures that would preclude reoccurrence (see Simmons' Mexican example).²⁷⁸

These are valid concerns. While expectations of explanations for the formation of first governments or sanitizations of history are farfetched (especially considering the underlying intention here is not to justify political obligation but to rescue authority), particularity obviously remains an issue even in this new obedience-within-the-well-functioning state logic. Contrary to any expectations that a lowering of the normative bar for obedience may facilitate meeting this requirement, these accounts bring about renewed doubts about restrictions in applications being made in a morally allowable manner on solid grounds. Simmons is entitled to his objection insofar as this claim from efficiency, understood broadly as just administration on a

²⁷⁷ Simmons, "Democratic Authority and the Boundary Problem", pp. 339-341.

²⁷⁸ Simmons explained why justness/justice are insufficient for particularity by arguing that, if the US were to invade Mexico, extending obedience to include them could not be justified by claiming that US institutions are just, and therefore worthy of and therefore entitled to obedience. The underlying point is that you can't justify subjection on an argument from the quality of institutions in alleged authority; Mexicans would not have to obey just because the invading government is just; *ceteris paribus* no one has to obey because an encroaching government- including the one we normally refer to as "ours"- exhibits some redeeming quality. *Ibid.*, p. 341.

majoritarian formula, is a double-edged sword: it could help legitimize actions over those considered to be under a state's authority, but it could do the same for actions directed at outsiders. In the Kantian-functionalist universe nothing prohibits a more capable, more just state from invading a lesser one on a contention that the newly invaded will be better off under the authority of these better functioning institutions; these accounts presuppose no safety valves designed to preclude such actions and they do not expressly disallow claims to authority made in these sort of circumstances. Their arguments could, therefore, serve as justification for actions previously held to be nauseating.

This issue, however, is more of a concern about a theoretical possibility. The main mistake is the failure to establish appropriate exclusivity in subjection. Although these accounts are not expected to source the obligation to obey, they do need to show that/why/how a certain group G is the subject of state S's authority. In other words, while defenders of political authority are excused from demonstrating that members of group G are, individually and collectively bearers of a duty that binds them to perpetual surrender and compliance, they do need to make it clear that state S has authority over group G, exclusively (as opposed to three members of state S, 75000 members of state Y and half of the members of state X, or any variation thereof). By insisting on the qualities of these states, and the effective, democratic way in which they perform their tasks of statehood, they do not show the considered subjects to be rightfully subjected, they just show a general, unspecific, perhaps purely theoretical democratic state to be worthy of the piecemeal obedience of an unspecified group of people that may or may not comprise all those – or only those – within an area designated by borders. All in all, they do not show obedience to be a special relationship between concrete states and the moral beings that inhabit their legally claimed jurisdictions.

Why these accounts do not spell out their reasons for believing justifiable authority matches borders is a consequence of a continued conviction that birth (*pace* Kant) and proximity (*pace* Waldron) are sufficient. Given that the burden settled on here is not a moral requirement, these arguments are not as unpalatable as they once were. Nonetheless, inasmuch as heavy demands are still being made and still held to be the contents of claims states are justified and entitled to make, they do need to be shown to be correctly attributed, in a moral sense. The consequences of failure are thus still unacceptable. By not providing proper arguments that definitively establish

the presumed subjects of an authority to be the actual and all subjects of that authority, these accounts remain in permanent danger of over/under inclusivity and all the negative consequences attached to it, most importantly the risk of moral injuring. Such as they are, they do not preclude the drawing of comparisons between their alleged subjects and Simmons' victims in the Mexican example; nor do they, conversely, disallow considering those excluded from life under an efficient-just state on consideration of birth-assigned citizenship morally as having been victimised on improper considerations. Ultimately, improperly defended exclusivity is an invitation to arguments about aggressions, be they classical or soft (denials of choice, secession, alternative supply or exclusion).

On a more positive note, these "it is as it is" type justifications can be defended as able to say something about *de facto* authority – legitimizing it in a weaker but sufficient sense – even if not in a way that vindicates the territorial rights of states and borders, or one that perfectly aligns authorities with political memberships. On this type of reading, claims to authority are intelligible, believable and, to an important degree, justifiable, meaning that we will have significant amounts of obedience; not as much as an account of political obligations would provide, but much more than utilitarianism or philosophical anarchism can explain. This is not to say, however, that a harsher conclusion could not be argued for. Their inability to meet the particularity requirement (both as restriction and inclusion) is glaring, an uncharitable critic potentially going as far as dismissing them as arguments that do not make much progress past the largely uncontested claim that states are useful and people should not interfere with or preclude their actions.

To conclude on this, whether or not they vindicate *de facto* authority as the province of *legitimizable*, but not fully legitimate, states with intelligible, arguably correct, claims to the obedience of groups that should comply (albeit not as an obligation) is a matter of interpretation; the main obstacle in favour of more positive final findings remaining the unsatisfied criterion of particularity, which will persist in being an issue for as long as real-world compliance remains districted. As far as our problem of political obligation is concerned, however, they categorically only serve as reminders that arguments from properly performed services do not cover the breadth of space between it and simple political authority, and as tools in the proper identification of the hurdle that has to be cleared by an account of obedience as the

content of a moral requirement to obey if it is to count as sufficient justification of political obligation.

Importantly, they also serve as a moderate alternative to philosophical anarchism, specifically modern, a posteriori that does not view personal autonomy as fully irreconcilable with any measure of submission nor refuses to allow that, in certain conditions- contract and consent- genuine legitimacy could be achieved.²⁷⁹ In this sense, this version of philosophical anarchism is, more than anything, an inescapable realization to be had at the end of a process of evaluation revealing political obligation to be unjustified and thus all *existing* states to be illegitimate in the full, true sense. This is not to say however that proponents believe citizens do not have to obey: Simmons, perhaps the best known modern philosophical anarchist, explains that, while states are illegitimate, made so by “their contingent characters” citizens will be “of course, still bound by their non-political moral obligations and duties, and these non-political duties will sometimes have the same substance as the subjects’ legal requirements.”²⁸⁰ In these conditions a posteriori philosophical anarchism’s implications are rather unobjectionable. While there may be no general moral requirement to obey, submission towards the state’s law will often be justified by anterior non-political moral requirements and by more mundane considerations of practicality and common good. In other words, while there are no *stricto sensu* political obligations, there will be other duties with approximate content, the freedom to regard the state and its laws as non-authoritative and non-mandatory therefore neither necessarily meaning that citizens are free to disobey at all times nor justifying resistance. Philosophical anarchism consequently has all the hallmarks of a tenable position: it provides some reasons to comply, it is not drastic or revisionist and, from a theoretical and methodological standpoint, it is an acceptable conclusion reached at the appropriate time.²⁸¹ For these very reasons it is also uninteresting, being moderate

²⁷⁹ Raz (“The Obligation to Obey the Law”), M.B.E. Smith (“Is There a Prima Facie Obligation to Obey the Law?”), Green (The Authority of State), Lyons (“Need, Necessity and Political Obligation”) and of course A.J. Simmons (all) are all philosophical anarchists.

²⁸⁰ Simmons, “Philosophical Anarchism”, 107.

²⁸¹ Which prompted Gans to describe it as toothless. C. Gans, *Philosophical Anarchism and Political Disobedience*, Cambridge University Press, Cambridge, 1992, p. 90. Others however strongly disagreed and held philosophical anarchism to be quite radical: T. Senor, “What if there are no political obligations?”, *Philosophy and Public Affairs*, Vol. 16, No.3, 1987, pp. 260-268. T. Honore, “Must we Obey? Necessity as a Ground of Obligation”, *Virginia Law Review*, Vol. 67, No.1, 1981, pp. 39-61, pp. 42-44).

as threats go and inconsequential to practices of compliance even on paper.²⁸² The only issue with it is that, as a finding reached presently, it is arguably rushed (though for good reasons), insofar as not all avenues towards the vindication of political obligation have been explored. Which brings us to the question “where are we now”.

Conclusion

The end of analysis of existing accounts of political obligation coincides, I think, with a vindication of what I stated to be the first of my two original contributions to the thought on obligation- a demonstration that paradigms of political obligation produced so far fail and will necessarily continue to fail because of structural flaws. I believe I have shown each type of justification to present with fundamental issues – recurrent throughout existing accounts and unavoidable in any new possible iteration – that definitively preclude achieving the justificatory goal. I have shown transactionalism, for example, to be incapable of accounting for the lack of evidence of will, or make up for giving up on it altogether in a way that does not cause alternative issues; we know now not only that Beran misidentified an incorrect choice situation as morally permissible, and that Estlund’s normative consent is useless, but, most importantly, that the inevitable mutilation of the concept of consent (brought about by the realization that it is irreconcilable with ~~C7~~conformity and thus ~~C1~~generality) leads to unresolvable problems with ~~CO1~~Asufficient-normative-strength, ~~CO1B~~non-degeneration, and ~~CO4~~precise-content, or produces constructions that are no better than the lower specie of thesis of authority. At the end of the second chapter it was obvious that one cannot imagine or remove will from transactions and still discover political obligation, at all or specifically; and there can be no compensating for this practice [of distancing consent from intent] that does not necessarily equate to degeneration, or necessarily bring about questions of content. Transactionalism failed not because its proponents were incapable of organizing their claims in morally and theoretically correct packages but because there are no transactions, or they don’t

²⁸² Lately, Martha Egoenides stands out through her 2014 *Philosophical Anarchism and Political Obligation*. Egoenides argues for a position she dubs “critical philosophical anarchism” (Gans’ original terminology, *Philosophical Anarchism*. 2), a form of anarchism that accepts the libertarian propositions that people are self-ruling autonomous individuals and that the state has no higher “ethical value” than it being a means to our ends but at the same time calls for the existence of a “full welfare state” serving us to the best of its abilities (p. 41). In these conditions, she holds the absence of demonstrable, justifiable political obligations to be testament to the fact that there is something intrinsically wrong with the state.

happen in the appropriate conditions and thus do not have the desired effects, or they can be presumed to have happen and have effects but we cannot confirm them as being political obligation. There can be no account in this logic that won't run into these crippling challenges.

The same holds true for the other observed theories. Associativism, no matter how desirous not to fall afoul of CO5non-generational-assumptions-from-attachments or CO6non-confusion will never not be faced with retorts that it's the moral principles governing relationships- and not relationship themselves- that generate obligations, or that a purported obligation's being part and parcel of a role does not actually count as a correct, permanent justification for its performance. That permanent, underlying doubt about what actually carries the normative load, and that practice of normative supplementation (again unavoidable, at least insofar as there is as need to circumscribe the paradigm to just societies), destroy associativism's claims to satisfy CO1A and CO1B normative strength/non-degeneration. And again, there is no navigating these obstacles, because associativism is fundamentally a claim that obligation is imposed by the role itself, in and of its own; every incarnation of this paradigm will thus necessarily run into these issue [at least]. Finally, the same holds for natural duty accounts. Content (CO4precise-content) and application (C6, CO3) are the permanent challenges facing justifications seeking to narrow down particularized political obligation as the conduit to the satisfaction of a *qua* human duty, and neither can be resolved. Regardless of the species of duty, the moral requirement to obey the law of one's state cannot be shown to be the specific, unique, permanent imposition on citizens, and it cannot be demonstrated that supposedly applicable institutions apply in a morally correct sense. It strains belief that disobedience or alternative actions can be completely dismissed as potentially conducive to satisfaction, given that we acknowledge reasonable disobedience and alternative supply specifically because we recognize them as occasionally correct counterparts to particularized compliance, and C6particularity and CO3precide-districting/inclusion will not, on this logic, ever be solved; there are only so many arguments one can make for restriction and all have been dismissed. As such, no natural duty account, whatever the duty, will manage to limit content and application in a morally unobjectionable fashion.

I find therefore that I was right in declaring these justifications structurally flawed, and therefore forever precluded from achieving their goal to explain the moral requirement to obey. There is something corrupt at the very core of their logic, and

because of that sooner or later they run into an issue they cannot move past. This brings about an obvious question of “where are we now”. Insofar one does not ascribe to philosophical anarchism, or to authority without political obligation, all observations made so far indicate the answer is “past the point where a genuinely new way of approaching the moral requirement to obey became a necessity”. Analytical political philosophy has devoted considerable attention to the topic, and many efforts have been made to improve, defend or disprove proposed paradigms. The list of criteria and conditions, our axiomatic assumptions about political obligation, our shifting, more inclusive, perspectives on the concepts of authority and legitimacy, are the positive legacies of these exertions. The lesson however, is that we have to move on; this is the answer to our question.

In the aftermath of the findings here however, those that insist on continuing to defend political obligation do find themselves in an advantageous theoretical position, one brought about by more awareness of the pitfalls associated with this kind of justificatory effort, and the consequences of ignoring them. Progress in the field is now obviously conditional on observing all the criteria and conditions I’ve set in the methodological chapter and on the now obvious, common-sense need not to persist in the established directions.

The step in the right direction is then a new, necessarily non-voluntary account that meets all the set requirements, and shows obedience to be a power-right states hold against citizens that have to obey *their* law for the categorical reason that it is *the law* of *their* state. In terms of going about this task, historically speaking, efforts to derive obligation have focused on detecting something special about states or citizens from which it could be sourced; experience has now instructed there is nothing sufficiently exceptional about either, a fact that forces us to re-examine political obligation as an equation. The only element not to have been investigated as a conceivable font of duty is the law itself.

Arguably two moments in the modern thought on political obligation were conducive to making the mental jump to recognizing the law as a potential ground: Simmons’ 1979 discussion on obedience without political obligation, when he argued that the moral requirement will often have to be satisfied because of the overlap between law and the commands of higher order moral duties, and that small gap separating Dworkin’s opinions on the morality of law from his argument from associativism. Of the two Dworkin is most surprising, as Simmons was still waiting to

be convinced otherwise by something similar to what was already available. Dworkin on the other hand had spent the better part of the first 200 pages of *Law's Empire* arguing that norms are sometimes laws because of their moral merit, that they play an important part in the determination of the legal and obligatory, etc., before finding obedience to be morally required on the basis of a convoluted argument from associativism in “true communities” that ignored the possibility that law’s being obligatory may have to do with the very moral nature he had so vigorously defended previously. In the next, final chapter I explore law and its nature as a potential source of duty.

The challenge I set for myself then is to prove there is merit to the hypothesis “the moral requirement to obey the law is justified by law’s providing citizens-trapped in new moral relationships- with rights and responsibilities law also sustains and regulates”. I do so starting from a claim that the law is moral. The first obstacle in this direction is establishing the proposition itself to be an intelligible opinion that is not only beneficial to a positive conclusion about law being morally obligatory, but also a statement about law’s nature that is acceptable to both moral and legal theory. In this latter direction, this is no easy feat. Although no one expresses any doubts about humans or states being moral, we are still, at least formally, in the throes of a fifty year-long debate between positivists and anti-positivists about whether or not law shares in this moral nature. As we generally move towards accepting this proposition, it bears to question whether or not law being moral has any consequences on the moral requirement to obey, if perhaps the reason- or part of the reason- why we have to acquiesce to its commands has something to do with this very nature. I believe law’s moral nature to be determinant. Consequently, I attempt to vindicate this moral nature, and subsequently find it to be a moral entity and agent that can impose and be owed moral requirements.

Once done, I map out the road from the possibility of compliance to the reality of political obligation. To do so I begin by arguing that we owe law a small measure of compliance as a manifestation of consideration for a fellow moral agent whose singular demand is obedience. Then, I argue positivisation-law making on the basis of moral norms- to generate piecemeal compliance not unlike the kind thesis of authority impose. Finally, I argue that compliance in my sense (political obligation corresponding to a right against) derives from law’s provision and regulating of entitlements. Having done these, I show the account meets the two conditions –

particularity and reasonable disobedience- that may appear to be jeopardized by my claims. Fourth and finally, I insert myself in the legal theory debate, to address the orthodox side's concerns that an account that holds the law to be moral fails the authoritative condition, and brings about epistemological problems that impede recognizing and applying law; without constructing a full theory of law, I show that none of my contentions threaten these two features, or positivism in itself. I conclude that my account works.

Chapter V: Towards a Moral Account of Political Obligation

My argument for political obligation relies on the idea that “the law is moral” in order to establish authoritative facts about legal rules. The law here is postulated to be- and understood as- a moral agent with moral fibre, wants, entitlements and duties of its own. This postulation is not a heuristic device held to be sufficient for the present goal of justification, but a metaphysical choice to conceptualize the law in the same manner states and institutions have often been - i.e. as moral agents with rights and responsibilities. When I describe the law as a moral agent then what I mean is that the “the law” has will, and the abilities to have moral expectations and make moral demands of other, ordinary human moral agents.²⁸³ *Ceteris paribus*, whenever moral agent “person” intersects with moral agent “the law” some of what the former owe to other humans *qua* humans will be owed to the law *qua* the law too, because in both scenarios that person brushes against the universe of wants/demands/needs/requirements of another moral entity. The only, obvious caveat to this is that the law will be excluded from any entitlements derived from corporeality.

When claiming the law to be moral what I also aim to convey- besides the fact that it too counts as a moral entity with duties, rights and agency- is that it is additionally in possession of a moral code it shares with those under its supposed authority. This latter feature is a consequence of a) law-makers inserting their own moral precepts and beliefs into law in the process of legislating, b) law being determinately influenced by the moral opinions of the citizen body it regulates and c) vice-versa determinately shaping the moral behaviours and opinions of the same group. What I am not saying however is that laws cannot be immoral or morally neutral or that law is incapable of such behaviours: much like us, the law is capable of

²⁸³ I hold that three conditions have to be satisfied in order to be able to ascribe moral agency: the purported moral agent has to have the ability to distinguish between right and wrong, its actions have to be subjectable to moral scrutiny and it has to be in a position to make decisions that impact others. The law meets all three: it not only clearly distinguishes between designated rights and wrongs but it is also actively involved in determining them, and routinely translates them into the *legal* and *illegal*, in appropriate circumstances²⁸³; law’s demands and actions are permanently interpreted and judged on the basis of the set standards²⁸³; and clearly law’s actions and resolutions have effects on other agents’ lives that register on the moral scale. Law clears the bar for agency.

all sorts of actions without losing or jeopardizing its status as a moral entity or agent. “The law is moral” is not a statement about its moral excellence or moral superiority.

It is similarly important to establish here that the claim “the law is moral” is not one about content [of the laws] and certainly not about consequences. The law’s moral status is not held to be contingent on, or predicated upon, its real-life implications. Often, this sort of affirmation about law being moral is taken to mean that law aims or manages to produce positive results, be it in a strict moral sense or in a utilitarian one. This is not the case here; law being moral is a claim about law’s nature and status, not a statement designed to underline its unobjectionable effects, the positive consequence of law-abidance, the instructions offered by the balance of reasons, etc.

The syntagm “the law” raises additional questions about my understanding of law as one body vs. a sum of legal rules. To clarify I hold *the law* to be both *distinct* and *indistinct* from laws. It is indistinct in the sense that in its most concrete form – on paper– it presents as a sum of laws raging in scope and importance. This is no different from us being, in our most concrete physical shape, a sum of limbs and parts. *The law* is distinct from laws however that it has more moral charge, value, essence than a mere totality of legal rules. Again, the same can be said about persons; just as we are more, in moral terms, than a joined collection of body parts, the law is more, in moral terms, than a sum of legal parts. And just as our moral essence has implications for our physical body, the law’s moral essence has implications for its legal body. More importantly, the law’s moral essence has implications for the way its moral-legal body interacts with our moral-physical body in the political realm.

Concerning the claim that “the law is moral” understood in an indistinguishable perspective, something more needs be said concerning its potential effects on compliance. Firstly, as we shall see better later, this claim about the nature of law is held to be reconciled with the concrete existence of immoral or neutral individual pieces of legislation. Secondly, as we move forward towards an account of political obligation built on this statement, it should be made clear that the argument will cover all law, including neutral or immoral ones (these latter as far as possible). What I mean by this is that properly justified political obligation is synonymous with a duty to obey the law, all law, as far as *prima facie* character, reasonable disobedience and non-triviality allow. So, assuming here that I explain the existence of a moral requirement to obey, that explanation will make acts of obedience mandatory towards

all the demands of law, including those that fail to count, when taken individually, as moral. They will be made mandatory by their being the requirements of law in possession of a power right against citizens, independently of whether or not they can or do count as moral, except of course at the exceptional intersection with laws so bad that superior moral considerations become involved, annul duty, and permit reasonable disobedience; connectedly, instances of nit-picking arising from empirical observations that there are inefficient, obsolete or plainly stupid legal rules in any legal system are equally not toxic, because they do not detract from the moral status of law in the distinguishable sense, nor jeopardize political obligation, as the authoritativeness condition is met. And last, what matters here is the moral status of the law as a whole, not the ability to locate each and every law in the moral reservation, something that is anyway the rule, rather than the exception.

The reason why I think inability would be the exception is my own perspective on law. I hold law, in the indistinguishable-structural sense, to be a pyramidal construction that sees a moral trickle-down effect that ensures most laws register on the moral scale. At the apex of this pyramid is organic law, straightforwardly derived through positivisation from moral norms, and therefore in possession of the most obvious moral character. It is followed closely by the important prohibitions that guarantee and safeguard the above. These prohibitions have moral worth not only of their own however, but also additional one sourced in the fact that they support and facilitate the more important part of legislation placed directly above. The same can be said about each “level” of law – it supports what is on top and is supported by what is below. Even the most mundane legal norms thus gain a measure of moral merit derived, at the very least, from their serving the superior purposes of higher-ranking law: for eg., directives governing trash disposal may not be the most clearly moral, but insofar as they are conduits to public health and environmental safety, they support the pursuit of happiness. So political obligation relying on the statement we make is not jeopardized by the existence of immoral or amoral laws.²⁸⁴

²⁸⁴ In the indistinguishable sense positivisation and the trickling down effect add to the balance of evidences that the law is moral. To be clear, even in this perspective, the law is still primarily moral because it counts as a moral agent (the law’s status as moral agent assigns moral charge to its parts the same way our status as moral agent assigns moral charge to our limbs, and The Queen’s royal status assigns royal charge to every aspect of her body); but the facts that laws are sometimes derived directly from moral norms and the pyramidal construction that is a legal system sees moral charge flowing downwards count as well.

“The law is moral” however is not a statement that has the same meaning and implications for both moral philosophers and legal philosophers. If for the former this statement is a more or less acceptable claim that law too is a moral entity, for legal philosophers it is a claim that legal rules are necessarily moral in content, consequence and source. Legal philosophers -at least of the kind discoverable today - do not recognize “the law” as, in some dimension, distinguishable from its parts; to their minds the contention that “the law is moral” thus translates as one that all legislation has moral charge and moral worth, and legality is contingent on it exhibiting these features. As such, if for moral philosophy of the kind we are performing the statement is both a descriptive and normative one about the nature of law, for legal philosophy it counts as a rejection of positivism (of the strong version of it at least), the dominant school of thought on law of the age, that automatically signals at least a rapprochement to Dworkinian interpretivists or natural law theorists.²⁸⁵

Expressing an opinion on theories of law, or formulating something that resembles one, is not one of my intentions. Justifying political obligation is not conditional on the formulation of a theory of law or on reconciliation with dominant positivism; for my argument to work what the law *is*, beyond being moral, is uninteresting. That said, insofar as “the law is moral” is a considered contention that runs against a distinguished thesis in legal theory that denies the existence of indelible

²⁸⁵ Given positivism’s triumph as a theory of law against natural law theory one would think this to be an unorthodox position. Critics of positivism, however, the overwhelming majority of who are not natural lawyers, agree with the contention expressed above. David Lyons, for example, denied the separability thesis after examining it in each of its potential meanings from minimal to maximal (*Moral Aspects of Legal Theory, The Rule of Law, “Moral Judgment and Legal Theory”*). Tony Honore believed that the two normative systems are connected to such an extent that not only morality determines the content of law, but law determined the contents of morality as well; he also insisted on the parasitism of moral language on legal language, on the appeals to critical morality in law-making, on the contingency of legal interpretation on morality and so forth. See Honore, “The Necessary Connection Between Law and Morality”. Daniel Brudney (“Two Links of Law and Morality”) emphasized the connection between law and morality by reminding us of the law’s treatment of legal subjects as sources of moral claims and that the effectiveness of legal systems is partially (at least) predicated on moral norms. Similarly, Philip Soper discovered necessary links between the two in the language and claims of legal officials (“Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute”), Michael Moore in the vocabulary employed in law and adjudication and in the practice of allowing morality to overturn the letter of law (“Four Reflections on Law and Morality”). Roger Cotterell in the practice of common law to devise legal principles from moral principles (“Common Law Approaches to the Relationship between Law and Morality”), Emile Durkheim, in legal systems’ “reflecting and expressing” of local moral norms (*Determination of a Moral Fact, Moral Education*) and even Raz expressed an opinion, in *Ethics in the Public Domain* (p. 211) on the separability thesis as “implausible” (“The separability thesis is . . . implausible . . . [I]t is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil”).

connections between normative system law and normative system morality, I must address their concerns, of which at least one could potentially jeopardize political obligation. In this direction, in the immediately following sections I first explain positivist attitudes on the relationship between law and morality; then, I argue Leslie Green to be convincing and correct in his criticisms of their separability thesis and his argument that there are at least seven connections between the two that are neither unnecessary nor unimportant, the two thresholds they established for connections seeking to invalidate separability; and finally, I clarify that the statement itself forces no affirmations of the kind natural law marshalled and should be taken neither as a pretence that every law is moral, nor as a desire to hold moral merit to be a condition of legality. I do this not to vindicate opinions contrary to orthodox positivism but to show that, from whichever point of view, the proposition “the law is moral” should not be an unacceptable one.

By and large legal positivism is an opinion that law is a social fact and a matter of artifice, practice and custom that heavily endorses a separation thesis between law and morals. This “separation thesis” suggests that positivists view the two normative systems, law and morality, as detached. That is not so; H.L.A. Hart’s-positivism’s foremost proponent- argument was not that laws and morality are separate, or that they should be kept separate, but rather that there is “no necessary connection between law and morals or law as it is and ought to be”, meaning that a norm’s status as law is not predicated on its exhibiting some measure of moral merit during a process of inspection.²⁸⁶ That is why Leslie Green proposed the more helpful- and now orthodox- name “separability thesis”.²⁸⁷

In the first years after the original articulation of the thesis positivists were in a peculiar position: though they “won” the debate with competing views on the nature of law completely, so much so that second half of the twentieth century legal philosophy became synonymous with legal positivism, in the face of what little criticism they encountered- most vigorously from Dworkin and his interpretivism- they were drawn into a conflict of perspectives with each other as to how deep

²⁸⁶ H.L.A. Hart, “Positivism and the Separation of Laws and Morals”, *Harvard Law Review*, Vol. 71, No. 4, 1958, pp. 593-629, p. 601. Hart develops his theory fully in *The Concept of Law*, Oxford University Press, Oxford, 1961. Joseph Raz provides a good summary of the tenets of legal positivism in *The Authority of Law*, Clarendon Press, Oxford, 1979, especially pages 36-39.

²⁸⁷ L. Green, “Positivism and the Inseparability of Law and Morals”, *NYU Law Review*, Vol. 83, No.4, 2008, pp. 1035-1058.

“separability” truly runs. What was clear from the very beginning in this fraternal debate was that there was no denying that morality provided law with goals and aspirations, or that there were “a thousand points of intersection” between the two (to use Hart’s phrase). The true issue was determining how much intersection and how much incorporation the separability thesis allowed for within the logic of positivism, i.e. to what extent could law be tied to morality when holding law-making, law-abidance and law-recognizing to be fully independent of its norms. In the language of legal theory, this took shape as a discussion on the possibility of including morality’s principles in the criteria of legal validity set by the rule of recognition. This is how the two schools operating in this framework – exclusive legal positivism (ELP) and inclusive legal positivism (ILP) – first appeared.

Exclusive positivism took no prisoners. Raz and his followers declared all law to be source-based and rooted in social facts, and denied any suggestions that appeals to extra-legal moral standards in legal adjudications equated to incorporation.²⁸⁸ They also denied that moral principles (standards) can act as criteria of legal validity and argued that, if they were to somehow make it into the law, their legal hold would be owed exclusively to their being positivised according to the rule of recognition, not to their intrinsic moral worth. Most importantly however, Raz and fellow exclusivists defended ELP as a position perfectly reconciled with the normal justification thesis of authority. In other words, in their view, whatever law is – and whatever relationship it entertains with morality – should necessarily not come into a conflict with the central tenet of the thesis, the proposition that authorities act as go-betweens between reasons for action and people who are better off acting not on whatever prudential, primary reasons they can identify, but on the basis of the secondary reasons offered by those in authority. Exclusive positivists believed that the acceptance of moral standards as criteria of legal validity that Dworkin²⁸⁹ defended and ILP accepted, negates the authoritativeness criterion, as it gives leeway to moral appraisals that nullify claims to

²⁸⁸ The primary and secondary literature on positivism and its branches is too vast to cite. Most important on ELP are J. Raz: *The Authority of Law*; “Authority and Justification”, *Philosophy and Public Affairs*, Vol. 14, No.3, 1985, pp. 3-29; “Authority, Law and Morality”, *The Monist*, Vol. 65, No. 295, 1985, pp.295-324; *The Concept of a Legal System*, Oxford University Press, Oxford, 1980, the appendix. Also see S. Shapiro, “The Difference that Rules Make”, B. Bix (ed.), *Analyzing Law*, Oxford University Press, Oxford, 1998; Shapiro, “On Hart’s Way Out”, *Legal Theory*, Vol. 4, No.4, 1998, pp. 469-507; A. Marmor, *Interpretation and Legal Theory*, Oxford University Press, Oxford, 1992.

²⁸⁹ Dworkin battled positivism in *Law’s Empire*, Harvard University Press, Cambridge, 1986.

authority; this is the concern that will have to be addressed as a potential threat to obligation.

Exclusive legal positivism was opposed by inclusive positivism (ILP), the side of the school that remained truer to Hart [who, in the Postface to the *Second Edition* expressed his adherence to this view]. ILP was less radical in its opinions about incorporation and generally more open to the possibility of the rule of recognition incorporating moral principles on the basis of merit alone; in simpler terms, ILP's endorsement of the separability thesis remained moderate.²⁹⁰ Its proponents argued against ELP's opinions on the effects of inclusion on authority and identification by reminding Raz that it does not follow from authorities' claims to legitimate authority that they – and law – are the sort of things that genuinely allow for these sorts of contentions to be made; that the moral standards that make it into law need not necessarily coincide with the moral reasons that would vitiate the NJT; and that moral standards can act as criteria of legal validity without it being the case that citizens need to consider them in order to discover the legal or to motivate their own obedience.²⁹¹ Jules Coleman, Hart's torch-bearer and ILP's foremost exponent, became increasingly open to this position. Initially, he agreed to this inclusion only as long as it was done according to the precepts of the rule of recognition, thus ensuring that it was warranted by pedigree, rather than by moral merit alone and directly.²⁹² Later on, however, he conceded that, sometimes, moral standards make it into law because of moral value alone,²⁹³ an opinion he defended strongly in *The Practice of Principle* as something that neither robs law of its authoritative nature, on any reading, including Raz's, nor the rule of recognition of its alleged epistemic power.²⁹⁴ Finally, in "Beyond Inclusive Legal Positivism", Coleman bit the bullet like no positivist had done before and stated his belief that the separability thesis is most

²⁹⁰ Other inclusive legal theorists are J. Coleman, *The Practice of Principle*, Oxford University Press, Oxford, 2001; Coleman "Authority and Reason", R. George (ed.), *The Autonomy of Law*, Oxford University Press, Oxford, 1996; W. Waluchow, "Herculean Positivism", *Oxford Journal of Legal Studies*, Vol. 5, No. 2, 1985, pp. 187-210; Waluchow, "The Weak Social Thesis", *Oxford Journal of Legal Studies*, Vol. 9, No. 1, 1989, pp. 23-55; Waluchow, *Inclusive Legal Positivism*, Oxford University Press, Oxford, 1994; M. Kramer, *In Defense of Legal Positivism: Law without Trimmings*, Oxford University Press, Oxford, 1999.

²⁹¹ J. Coleman "Authority and Reason", *The Practice of Principle*, Oxford University Press, Oxford, 2001.

²⁹² J. Coleman, "Incorporationism, Conventionality and the Practical Difference Thesis", J. Coleman (ed.), *Hart's Postscript: Essays on The Postscript to The Concept of Law*, Oxford University Press, Oxford, 2001.

²⁹³ J. Coleman, B. Leiter, "Legal Positivism", D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell, Oxford, 1996, pp. 228- 249.

²⁹⁴ Coleman, Leiter, "Legal Positivism".

likely “false”.²⁹⁵ Not all supporters of ILP are as permissive as Coleman, however; the majority just orbit around the moderate position that moral standards can be part of law on the unique basis of moral worth, with the accept of a permissive rule of recognition.

Our intention to derive political obligation from the statement “the law is moral” draws us into the debate between positivism and anti-positivism on what appears to be the side of the latter. That is not true. A rejection of the separability thesis does not bring about or imply a rejection of the other tenants of positivism, and does not constitute sufficient evidence of belonging in the natural law category or of allegiance to Dworkinian interpretivism – it just bars us from agreement with exclusive legal positivists. The arguments ELP formulates against ILP, and against all those who more or less explicitly discover some truth in the idea that the law is moral, will need to be addressed, not because there is any genuine interest here in the nature of law, i.e. of what the law is beyond it being moral, but because they equate to doubts about the law’s ability to remain authoritative on such a view. In the next sections I will defend inclusivism’s rejection of Razian criticisms as persuasive, and reject exclusivism as a self-serving position that is counterintuitive, methodologically objectionable and dubious in its attempt to extract a theory of law with the *a priori* caveat that, whatever is obtained, must not contradict a previously elaborated theory of authority which is in no way axiomatic or even widely accepted, and whose best case scenario makes obligatory institutional decisions in a world devoid of generalized political obligation. It is a peculiar practice, to prioritize a justification thesis over the production of a theory of law that most accurately reflects, encapsulates, and explains the realities of everyday legal subjects, courts and legislators. In these conditions, our view on ELP’s protests is that they are not only *tout court* wrong (and conducive to an improper understanding of law) but also, to some degree, disingenuous. As explained above, however, what matters here is not that ILP “win” against ELP, or be shown to be the superior branch of positivism and a better theory of law, but that ELP’s opinion that all arguments open to suggestions that the law is moral are poisonous to authoritativeness and identification is shown to be wrong.

²⁹⁵ J. Coleman, “Beyond Inclusive Legal Positivism”, *Ratio Juris*, Vol. 22, No.3, pp. 359-394, 2009, p. 383.

“The law is moral”, in the indistinguishable legal theory sense, is then a proposition that implies an outright rejection of the thesis that holds morality and law to be two normative systems perfectly separable. Demonstrating law to be moral to legal theorists requires identifying connections of the kind positivism could not, or would not imagine to be present, thus challenging it on one of its main tenets. In doing this, three things should be kept in mind: (1) positivism’s tenet is that there are no necessary connections between laws and morality, not that there are no connections between the two; (2) in Hart’s work “necessary” changes meaning to “important”;²⁹⁶ and (3) there is an important distinction between the denial of necessary connections between laws and morals, and the statement that law can be identified without recourse to morality, only the first being rejected here. All three are determinant.

In “Positivism and the Inseparability of Laws and Morals” Leslie Green argues convincingly that the separability thesis is false by indicating a number of indelible derivative and non-derivative connections between the two having to do with the scope, purposes and objects of law. In that article he discovers seven bridges between the two spheres than cannot be torn down, anchoring the two systems to each other in such a way that the prospect of separation becomes illusory; these connections are neither non-necessary nor “unimportant”. Green’s list is exhaustive of the issue and, as I show, at least medially authoritative.

Green’s list of connections consists of the following:

Na: necessarily, law and morality both contain norms.

Nb: necessarily, the content of every moral norm could be the content of a legal norm.

Nc: necessarily, no legal system has any of the personal vices.

N1: necessarily, law regulates objects of morality

N2: necessarily, law makes moral claims of its subjects.

N3: necessarily, law is justice apt.

N4: necessarily, law is morally risky.

²⁹⁶ When he retreated a bit by saying that there are “no important connections between law and morality”. Hart, *The Concept of Law*, 2nd ed., p. 259.

Of the seven, the first three are weaker but still hard to imagine as absent or trivial. Morality is, after all, a system of supposedly persuasive and pre-emptive norms that the law routinely selects for incorporation, thus transforming their original pre-emptive character into peremptory one. Legality imbibes moral norms with efficiency, providing that additional strength required for them to regulate individual and collective human behaviours effectively.²⁹⁷ It may seem trivial – in the sense of obvious – but there is no moral system without norms and no legal system whose important parts do not consist of positivised norms. The only possible objection could be an accusation that Green takes positivism to reject the idea that many of law’s and morality’s prescriptions and instructions coincide, when all positivism denies is the suggestion that this is a blanket statement valid for all law, i.e. that it is necessary for a law to incorporate some element of morality/something morally valuable in order for it to be considered as such. So, while this holds as a general statement about the entire body of law, in particular instances it may not be true. The second of Green’s contentions is very clearly true, however. Although results may be morally risky or may wound in our more-or-less justified moral judgments, the fact remains that there is no legal system on Earth disallowing the practice of incorporation. The upshot is that legal systems that have done this (all of them) are necessarily and blatantly systems in which the law is sometimes law because of considerations of morality: a moral norm that has made it into law has done so because of its moral worth, even if the translating act itself was governed by other, “drier” criteria of the rule of recognition; and thus whatever legal norm is born, its worth is still essentially moral, even if its effectiveness or coercive power or peremptory ability is owed to the law-making act.²⁹⁸ The third, on the other hand, can be said, at best, to point out that legal systems are not prone to exhibiting the few moral failings it is possible for human beings and artificial systems of rules to share and, at worst, is theoretically uninteresting.

²⁹⁷ Green, “Positivism and the Inseparability of Law and Morals”, p. 1044.

²⁹⁸ This is perhaps better captured by a sports metaphor. The reason why a newly recruited football player is now part of Team Great is his great skill at playing football. The signing of a contract and registering with the club and whatnot are just formalities that change his status from non-member to member. If you were to ask him, his coach or a fan why he is a member they would not invoke his contract but his skill at “...”. The same goes for moral norms that are positivised into law. Undoubtedly the process itself is important and undoubtedly criteria of legality matter; but the background reason, the answer to the question “why”, remains the moral worth.

With the fourth point Green's list becomes much more compelling. It is undeniable that laws and morals both regulate the public. They do so not in parallel but in concert, with laws often compelling when moral norms only instructed and morality sometimes justifying when laws *prima facie* prohibited. Humans, therefore, as individuals, as members of groups and institutions, operate under two masters who do not compete against each other, but work in tandem.²⁹⁹ Necessity, in this case, is hard to deny. It is hard to imagine a place where the subjects of morality do not perfectly overlap with the objects of law. Within any randomly chosen jurisdiction, for Green's claim not to be necessarily true it would need to be shown that a segment of a population, no matter how big or small, is *a priori* excluded from either respect for law or respect for morality. Given that law claims to be universal in its application over the members of a jurisdiction (it cannot say otherwise because then it would subvert its own claims to authority) necessity could be avoided only if some members were excused from morality – a logical and theoretical impossibility, as subjection to morality is a consequence of humanity itself. Thus, laws and morality necessarily govern over the same groups of people; and it is not at all unimportant that the bearers of legal duty and the bearers of moral duty coincide.

Moving onwards, Green clarifies N2 as law instructing us what to do and how to act beyond telling us “merely what it would be advantageous to do”.³⁰⁰ In other words, laws and morals both prescribe and prohibit behaviours, not just to maximize utility and guarantee order, but to produce and advance the common good, in moral terms. In doing this, law claims to have legitimate authority. Both propositions ring true. One need not share in the opinion that the law is an expression of the general will to see that, at least declaratively, all legal systems aim beyond utility and order to public well-being. Laws strive to achieve more than the good (as in useful, efficient, ordered, peaceful, just). The law is also concerned with the good in the more profound moral sense: it does not only seek to organize and coordinate us but also to better us, as moral beings living with and amongst other moral beings. The law, therefore, not only actively seeks to keep us from being immoral, it also limits the scope of possibility we have to be amoral; law makes moral claims of its subjects and expects moral responses from them beyond what is necessary for the satisfaction of its more

²⁹⁹ Green, “Positivism and the Inseparability of Law and Morals”, p. 1048.

³⁰⁰ *Ibid.*, p. 1048.

obvious purposes. Furthermore, it does not have only legal pretensions, it has moral ones as well and needs morality in order to produce moral obligations.

As for law's pretensions to legitimacy, Green explains them as claims similar to those of Pope's to apostolic succession *from Saint Paul*: it is not about veracity or about evidence but about the self-image they project.³⁰¹ This is also very much true (a point of theory with which Raz would agree, as he held law's authority – without political obligation – to consist of intelligible and believable but not necessarily true claims to it). No legal system thinks or presents itself as a codex of more or less important rules barked at citizens. Authorities pretend to have authority stemming from more than convention, the power of the stick, or complicated but ultimately prosaic rules of recognition; and those tasked with making and applying law and sanctioning trespasses against it engage in the pretence that law is obligatory in a justified sense, and that they are in possession of legitimate power corresponding to a right against the subjects of law.

Green's penultimate point illustrates an interesting connection between law and morality, although the relationship with necessity is more complicated. Laws are typically just in themselves and undeniably seek to produce justice. Green is concerned with the first, i.e. laws being "apt for inspection and appraisal in light of justice".³⁰² He thinks this "necessary" connection to be significant because comparatively few human practices can be judged and deemed just, not because they fail at being so, but because they suffer no such appraisals. Green finds it significant that laws are – in themselves – the sort of things about which it can be said "they are just/they are unjust".³⁰³

Undoubtedly, the law is just beyond respecting Fuller's criteria for the internal morality of law: more can be said about law following a moral appraisal than the fact that it excels in legality.³⁰⁴ Undoubtedly, parts of the law – the important parts, having to do with rights, liberties, freedoms, duties and burdens, etc. – are observably just; a

³⁰¹ *Ibid.*, p. 1049.

³⁰² Green, "Positivism and the Inseparability of Law and Morals", p. 1050.

³⁰³ Green agrees with my earlier observation that an unjust law that is still nevertheless issued in the proper manner and meets Fuller's criteria is still very much a law: "It is therefore incorrect to say that it is law's moral claims that open the door to morality in adjudication. It is not the claim to justice that makes some legal norms (and all judicial decisions) answerable to justice—it is the fact that they are, of their nature, justice-apt." *Ibid.*, p. 1052.

³⁰⁴ Fuller's criteria: general, publicly promulgated, prospective, clear and understandable, devoid of contradictions, constant, possible to abide by, administered in a way consistent with their meaning. See list in Raz, *The Authority of Law*, pp. 214-218.

special quality comparatively few human creations can exhibit that the law retains, even when its subjects are unjust, when it is used unjustly or even when it lies unused and forgotten. And, undoubtedly, just law has transcendental and transformative powers that go beyond ensuring effectiveness, fairness and order; law has the capacity to make its subjects righteous. An objector might counter-argue that this is but a half mouthed restatement of the natural law creed that only norms that pass a subjectively determined threshold of morality are law. This would not be correct, however. Green is not maintaining every law to be just; he is only asserting that all law is evaluable on this parameter and consequently discoverable on a scale that goes from just to unjust. He is, therefore, not excluding the possibility of a neutral or unjust norm.

This is then a good point that actually serves to confirm law's status of moral agent. An even better point to emphasize, however, would have been that all laws and legal systems claim to produce overall justice. No legal system holds or acts as if its norms were without moral consequences exceeding even-handedness, equality, stability, etc., or as if their only result were a basic maintaining of order; the purpose of courts is not limited to ensuring that all citizens follow the rules but extends further into moral rectification, vindication and advancement; the fairness with which legislators and adjudicators are preoccupied is not only about mathematically equal distributions of rights and burdens, but also about guaranteeing that the morally right is achieved; and so on. Not even the most atrocious regimes with the most warped conceptions of the just fail to claim justice in this sense. A legal system not declaring its role, purpose and function to be justice would not be a normative system – it would be a guidebook.³⁰⁵ The true significance of recognizing law's ability to be just, neutral or immoral then is the realization that, in whichever context it is introduced, law does not sit like a lawn ornament: it morally charges it and changes it in a moral sense. A context into which law has been inserted occupies a discoverable place on the moral scale, one different from the one it occupied previously. Law, therefore, at least necessarily alter contexts in the direction of justice and justness.

This brings us to Green's last point, which contests the presumption that law will fix all defects and will bring about the "good" and efficiency. Green points out that, at the same time as the link between law and morality guarantees that legal systems will have "virtues, it also brings about the possibility of "vices" to which

³⁰⁵ *Ibid.*, pp. 1053-1054.

subjects will inevitably be exposed.³⁰⁶ This is a fair point. Law's effects are not discussed only in terms of efficient versus inefficient but also in terms of "goodness". Those who deny the necessary connection between law and morals do the latter without considering the logical implication that what is capable of the good, or of bringing about the good, is also capable of bringing about the bad, understood as more than "inefficient". This vindicates Green's claim, even if only because it is inconsistent to award such credit to law and consider it a source of "goodness" but deny the possibility of it exhibiting shortcomings of a moral nature.

At least five of Green's identified connections pass the threshold from significant but unnecessary into necessary and important territory. Even if it were possible to imagine a legal system in which none of these connections are discoverable, they would still be true for our concrete legal universes, meaning that our real-world concept of law could not be fully formed or grasped without acknowledging them. The reverse would still work in Green's and my favour, however: regardless of whether or not it could conclusively be shown that the connections he identifies do not actually apply to our legal systems, it would remain possible to imagine an efficient legal system in which they exist *and* law can still be identified without appeal to moral principles. This retains the theoretical possibility of moral law, of inseparability, of authoritativeness and well-performed epistemic functions while avoiding the more unpalatable aspects of natural law.

Green's list of significant connections may be conclusive but that is not to say that others cannot be added. I, however, believe only one other important connection escaped Green's attention, namely the observable fact that law attempts to regulate human behaviours past the threshold of enforceability and prosecution. Law's prescriptions concerning "acceptable" behaviours stretch further than what the law genuinely deems indispensable and is ready to actually implement or punish for transgressing. This could only be testament to an ethical preoccupation with our interactions, interactions that law wants conducted in morally appropriate ways. In this domain, law is not so much regulating as it is seeking to impose standards, morally charged ones, from which if we depart we commit a *stricto sensu* infraction and a wrong, but not the kind of infraction/wrong law is bent on prohibiting and punishing, but rather the kind it wishes to avoid. These wrongs are legal wrongs only

³⁰⁶ Green, "Inseparability of Law and Morals", p. 1054.

because of law's ambitions and its Midas effect; at their core they are moral standards the law would have wished us to comply with because of its moral inclinations. A law that is not imbued with morality beyond what rigid positivists deem true would not extend its letter and gaze to areas in which it neither wants nor expects full compliance and prosecution. Thus, necessarily, some legal wrongs are actual moral wrongs that exceed law's area of enforceable, criminal interest but lie squarely in its perimeter of moral interests.³⁰⁷

Green's article defends connections between law and morality in a way that both dismisses reductionist [radical] positivist claims and says something meaningful about the nature of law in the spirit of moral philosophy. To anyone who sees merit in any one or combination of his points (especially the last four), continuing to endorse the separability between laws and morality appears not only entirely non-conducive to an accurate understanding of what and how law is and is made and used, and of legality as a whole, but an instance of concept misinformation. This has serious implications for the separability thesis. When taken maximally as a contention that the law has little to no moral content beyond what it is explicitly stated in its letter the thesis is likely false, as Coleman intuited. When taken minimally as a belief that it is theoretically possible to imagine a legal system with no recourse to morality, it remains true, but not descriptive of our concrete legal systems.³⁰⁸ Even if the separability thesis were true about legal systems understood as systematized sums of legal rules, however, it need not, and would not, be true of the law itself. Green's connections should at least illustrate that, even if codes of rules could consist of norms without important or necessary connections to morality, the law itself is in its spirit moral, in the same way that our atoms may be of dubitable moral charge but we are not, or institutions may just be bureaucratic constructions but states are regarded as moral personas. As such, in face of such evidence and intuitions, it should be hard to deny that the law is moral even in a legal perspective; law deprived of moral dimensions seems improperly or inefficiently understood. Most importantly, however,

³⁰⁷ Kent Greenwalt stresses a similar point that there are areas of *droit* in which law is satisfied only with "remedial satisfaction" because, while it theoretically imposes compliance, it is not interested in enforcing it or punishing those that do not comply. See K. Greenwalt, *Conflicts of Law and Morality*, Oxford University Press, Oxford, 1989, pp. 13-15.

³⁰⁸ David Lyons provides an excellent analysis of the many ways in which the separability thesis can be interpreted in D. Lyons, *Moral Aspects of Legal Theory*, Cambridge University Press, Cambridge, 1993, pp. 64-102.

“the law is moral” proves not be a sentence that jeopardizes the concept of law, the ability to make it or the ability to apply it. In this legal philosophy perspective, it is a mere acknowledgement of the fact, on occasion, moral norms do, in fact, on their own and because of their moral merit, act as sources of law.

The Road to Political Obligation

This discussion on moral philosophical vs. legal philosophical opinions vis-à-vis the relationship between normative system law and normative system morality allows for the drawing of some further conclusions about the law as a moral agent and laws as the pieces of its most concrete body. The correctly identified above-mentioned connections should underline the law as being moral as additionally due to its being imbued with morality from the moment of articulation, its important content consisting of positivised moral norms, its profound moral aims that go beyond mere utility, its making moral claims of its subject and its ability to charge/change any context in which it is introduced, its “justice-aptness” and its being subjectable to moral evaluations independently of its effects. As already emphasized, law’s status as a moral entity is not dependent or sourced in its consequences or behaviours; but the above-mentioned should reinforce convictions that it is appropriate to discuss the law in the terms that I do here. The law’s status as a moral entity is, I think, properly defended.

The law’s counting as a moral entity is, as already mentioned in the beginning, compatible with the observation that not all laws will derive from moral norms: obviously, sometimes a rule will be law because it satisfies criteria of legal validity other than the moral one; obviously, sometimes law will be law because it excels in legality without producing morally good effects; and, finally, sometimes it will be law for the same reasons even if its moral consequences are dubious. The corollary of “the law is moral” is not that the law is the positive sum of morally positive rules; the law can meet that description even if individual elements will not. Marshalled contentions about indelible connections between law and morality and about the morality of law are consistent with the view that rules that meet the criteria of validity and pedigree in the rule of recognition and Fuller’s morality in law standards, are laws, even if they are not positivised norms or even if they do not add morally to – or even harm – the space in which they are introduced. That the law is moral does not exclude the

possibility that one or more laws may be morally objectionable or inconsequential, the same way our own condition as moral agents is not belittled or jeopardized by the observation that our feet are morally irrelevant and our hands sometimes commit the immoral. In short, while our opinions definitively bar us from ELP, they do not commit us to natural law. And while our views are incompatible with the separability thesis, they are consistent with the idea that laws can be discovered without appeal to moral merit.

So far, we have explained what “the law is moral” means in a moral philosophy perspective that holds the law to be both distinguishable and indistinguishable from its parts, as well as in a legal philosophy one that does not. In this latter direction we have seen the opinion on separability between the two normative systems to be at least dubitable, while admitting that legal rules can count as law even if they are morally objectionable or irrelevant and made without reference to morality. Having done these, it is time to see how this helps in justifying the moral obligation to obey it. The first question to be asked is “can the law be owed moral requirements?”. The answer is obviously “yes”. Anything that demonstrates a moral nature is a moral agent, regardless of corporeality or the naturalness of its birth, with all the afferent rights, responsibilities and duties.³⁰⁹ Law, in spite of the artificiality of its history, is a moral entity and agent in the same sense and to the same degree as those designated by biology (humans) and traditions in dialectics (states). *Ceteris paribus*, what follows is an inescapable recognition of the law as a member of that group of agents that can theoretically, practically and conceptually impose and be subjected to moral requirements, up to and including the very heavy one of obedience, potentially. Denying this possibility would not only be incoherent but also morally wounding: it would exclude a moral entity from the possibility of a right on a weak basis most likely having to do with physicality. Law, in spite of the artificiality of its history, demonstrates sufficient moral essence, competence and ability to permit thinking of it as able to generate and be subjected to moral requirements.

The law can thus be owed moral requirements on the basis that it counts as a moral agent. Establishing the law as a moral agent, however, only takes us over that first hurdle of showing it to be the kind of thing to which obedience could

³⁰⁹ It is unintelligible to hold the law to have a moral nature and to accept the connections previously enumerated but to deny law’s status as a moral entity,

conceivably ever be owed. There is a huge gap between establishing this ability to impose, and establishing the content of the imposition to be obedience, exclusively. It is perfectly conceivable for law and citizens to entertain a relationship with one another in which the former imposes on the latter something other than obedience or something similar to obedience, but not of the same magnitude, such as a weaker duty of non-interference. Content has to be narrowed down, therefore.

A first step in this direction is discovering what law can be owed. Certainly, empirical observations of real-life and logic discount the law, as a moral entity, from being the object of certain types of duties. The absence of a physical body means that it cannot trigger any duty in us that would require action to preserve its somatic integrity (rescue, samaritanism, and the likes); and it means that while it can be harmed, it cannot be wounded or deprived in ways that threaten its survival, its mental, emotional or substantial health, thereby barring it from being on the receiving end of a duty of charity. Law is then an improper object of these duties. Logic, in its turn, makes law an awkward subject for others, such as gratitude, which may seem available but is not, as gratitude is owed by one specific individual to another specific individual/group for a favour, and law is not specific or partial in its function or effect. Finally, since law cannot be party to familiar relationships, collegial relationships, professional relationships, friendships or genuinely entertain the type of communal ties associativists had in mind, which require physicality, attachment, personhood and personality, law is excluded from being on the receiving end of corresponding applicable duties as well. These narrow the scope of possibility considerably.

Nevertheless, law could be the object of a duty of respect or a duty of fidelity or of a duty of inexact (and irrelevant) designation that imposes taking into account its opinions, interests and, to the extent possible, well-being.³¹⁰ What this duty is matters little; its content – and whether we can narrow it down to obedience, precisely – is what is key. The content of these types of duty we have already witnessed, in Chapter IV, not to be compliance *uniquely* or *necessarily*. As such, we appear to run into that crippling issue of imprecise content that ruined natural-duty accounts, who could not

³¹⁰ This duty's designation and source are irrelevant, not least because there is nothing to be gained by arguing obedience to be the predicate of a higher order duty. The duty could be from God Himself and content and particularity would still be a problem, and therefore negate obligation.

isolate compliance as the exclusive content of the duty. Here, however, we could zero in on content, to the point that it becomes clear that it is, in fact, compliance.

If we stipulate legal propositions to be law's opinions and its aims – from social order to overall justice and the common good – to be its interests, then respect, or good faith, or “X” takes the form of at least non-interference and sometimes going along with its demands (to an extent determined mostly at will according to the type and logic and interactions): in simpler terms, respect imposes that we do not interfere with law's activities and, occasionally, even help them. This is not an unorthodox opinion to have about the way two moral entities should behave when their universes of preoccupations and behaviours collide – not getting in each other's way and sometimes acquiescing to demands for the sake of one another's well-being (understood broadly) are part of the common package of social responsibilities and considerations. So, minimally, this unspecified duty owed to law *qua* moral entity imposes not getting in its way and at times assisting it in pursuing its goals. To be perfectly clear, no political obligation flows or derives from this; it just serves to show that non-interference and acquiescence are contents of a duty we owe the law *qua* moral agent.

Another factor however intervenes as well and it is determinant in establishing content. Law is a single-track mind – it wants, demands and expects only compliance and, unlike other moral entities, it is not open to alternatives or variations and exchanges, and does not change opinions. An obvious question here is “why does this matter?”; after all, in regular scenarios, a pushy asker being pushy does not count as a source of entitlement. Yet here it does matter somewhat because, unlike this pushy counterpart, law is incapable of demanding something other or less than compliance – it is not that it is not amenable to displaying flexibility, it is that it cannot. Part of the reason why content is generally so difficult to narrow down is tied to the inability to exclude manifestations of respect/fair-play/rescue/good-faith/etc. other than compliance. But if you conceptualize law as a moral agent and observe the fact that it only wants one thing then you cannot non-interfere, acquiesce, or display the prerequisite amounts of concern for its opinions, interests and well-being by ignoring its unique requirement. As such, if one accepts that (1) law, like all moral entities, is owed, that (2) law is owed non-interference with its opinions, interests and activities, and that (3) law is constitutionally and genetically intransigent and wants only compliance, then one has to accept that this duty does indeed foist some compliance.

This line of argument does not establish any obligation and therefore would not have rescued earlier duties of respect/justice/fairness/etc. paradigms. There is an important difference between claiming that a duty of “X” owed to fellow citizens can only be satisfied if one complies with local law, and, observing law’s only demand to be compliance, and *ceteris paribus* concluding that, insofar as law is owed something (that is no obligation) that something is compliance, exclusively: one is a claim of dependence, the other a statement about a theoretical and practical requirement derived from the observation that this moral entity can ask and asks for one thing. Compliance for natural duty proponents was a questionable predicate, for us the only possible content of manifestations of consideration, non-interference and going along. Other avenues towards the satisfaction of those duties can be imagined; but one cannot be considerate of law or go along with its interests or demands when compliance is its singular demand and preoccupation. Compliance is therefore first something we **very limitedly** owe to law as a fellow moral agent. Call this step 1.

To sum up the statements made so far:

1. Law is a moral entity and agent.
2. Individuals owe law a moral requirement, moral agent to moral agent.
3. This moral requirement cannot take some forms but it can present as a duty of respect or fidelity or “X”.
4. No matter what we call this duty, it presupposes consideration for law’s opinions, interests, well-being and aims.
5. Consideration takes the classic form of non-interference and some going along.
6. But law can only want and demand compliance; it cannot want anything else.
7. Hence we at least owe it the non-interference we owe all and some very limited compliance as one manifestation of consideration.

To be clear, this only underlines that the content of a duty we owe law *qua* moral agent is compliance.³¹¹ No obligation whatsoever has been established however, and thus non-compliance would not be the wounding of a justifiable

³¹¹ Because of this I hold “positivisation” to also count as a statement about the nature of law, i.e. law-in the indistinguishable sense- consists most significantly of moral norms positivised into legal rules.

entitlement; as such, while a behaviour that registers on a scale that goes from compliance to non-compliance might be the only available response to law in all scenarios in which we intersect as moral entities, compliance itself is decisively not mandatory. To move forward from this we have to focus on the issue of the content of law established through the process of positivisation.

I have claimed earlier that the most significant content of law consists of positivised moral norms. Moral norms, as we know, are strictly oughts and not musts, demands rather than commands, directives for behaviours, not conclusive reasons for action. Still, in spite of their genetic inferiority to legal rules and obligation, they do have regulative functions and the power and leeway to make requirements of us. I hold these abilities not to be lost post-positivisation, since positivisation cannot be toxic to them.³¹² As such, if there were no interrogations as to whether or not we had to observe the moral prohibitions of murder, rape, stealing, profiting from the harm of others, etc. prior to positivisation, then doubts about some duty to comply with these norms once they translated into the rules of organic and regular law are not founded, with the obvious caveat that the qualitative step into peremptory nature has not been shown to have been made. The moral norms in law therefore retain their pre-emptive character, meaning that norm-sourced legal rules have at least as much power and claim over us as the moral norms they positivised. Of course, the legal prohibition on murder is truly obligatory only if law-abidance is shown to be a power-right against citizens. But even in the absence of political obligation people have to comply with it; part of the reason why is its direct flowing from a moral norm. In other words, though law's command "you must not murder" has not yet been shown to be a *prima facie* obligation, insofar as it derives from a moral prescription, the legal proposition does have a claim – it is not a "must", but it is as much as a "should" as the moral proposition; and, if you take into account my previous argument, it is a somewhat stronger "should".

Some other things also need to be said, about the process of positivisation itself. Firstly, individuals that have the same moral code as law and citizens perform it, meaning that whatever results from it applies to the three parties involved in the relationship of political obligation (one law-one set of institutions- one set of citizens) specifically; this will later be relevant for C6particularity. Secondly, its performers

³¹² The process is law-making as we know it.

have the authority of expertise, being in possession of perfect or near-to-perfect knowledge about the mechanisms of the process of positivisation and the criteria of legal validity, of the conditions of legal excellence, of the means to resolve problems of identification or adjudication, and so on. Thirdly, this process has higher metaphysical purposes than the plain issuing of legislation; all law making, always – at least declaratively – aims at the highest common good and the advancement of citizen interests. Finally, positivisation is a process characterized by integrity, manifesting as equal concern for all, impartiality, care and so on. These are all evidence that it adds to the moral context in which the law and citizens operate, with the law having the upper hand. And notwithstanding the continued absence of obligation, they help see that positivisation is significant for obedience, even if it does not establish it. I hold positivisation to matter [towards obedience] not because of how it is performed or because of who performs it, but because of its significance for the relationship between the law and citizens. Aside of it allowing for pre-existing regulative power to be preserved in the process of transition from moral norm to legal rule, positivisation further adds to reasons for compliance without invoking balance of reasons type arguments. What I mean by this is that, beside being an implicit statement about the nature and content of law, positivisation should also count towards authority without political obligation (*de facto*, practical authority) at least as much as the normal justification thesis or any of the Kantian functionalist/structuralist arguments. Recall that the former held *de facto* authority to be justified (not in our political obligation sense) by citizens being better off if they acted according to the reasons in law rather than their own, while the others invoked good, democratic practices or preoccupations with justice to draw identical conclusions. In this direction, I hold that law and citizens share into the same moral code due to a process of positivisation that exhibits the above detailed features ought to be held to sustain *de facto* authority as well.

Law, in both senses, and its purported subjects are not only both moral but they are moral in the same way, a fact ensured by the “virtuous circle” resulting from citizen virtue having as one of its main sources institutional and legal design performed by institutions and law that, in their turn, were instilled with the same moral code as the one imbued in the society they regulate. This important commonality should count as an argument for obedience at least as much as “my institutions are majoritarian and justice producing” or “it’s better to comply than to

non-comply”: if *de facto* authority can be thought justifiable by arguments from inclusivity, justice, fairness then it should be held justifiable by arguments from a symbiotic moral relationship as well. Compliance –the kind supported by a thesis of authority- results from positivisation then; call this step 2.

The step forward to [compliance as the content of a right against] political obligation rests on the change that happened to the moral *paysage* once natural freedom was replaced with political subjection. Undoubtedly, in the absence of evidence of a permission to positivise granted at the original moment of subjection, the first occurrence of the process itself was illegitimate, its performers were illegitimate and thus unable to confer any supplementary layer of authority that would close the gap between what we have shown to be and genuine political obligation. When performing the typical mental regression associated with this sort of endeavour -to the moment that ended natural freedom and introduced the duty to obey- it becomes obvious that it does not coincide with the issuing of an express authorization from the future subjects of law to present and future positivisers to do so. It would be ahistorical to claim otherwise. This may seem like a *punctus terminus* for this account. It is not. It is just an awkward acknowledgement of an inability to account for the moment of legal inception. What is proposed instead is an argument about a gap between that moment T0 of unrestrained autonomy and freedom and moment T2, the moment moral agents became citizens and law came into play. During the interval of time T1, undoubtedly citizens were victims of unjustified oppression, akin to the recently subjugated Mexicans in Simmons’ *Boundaries of Authority* example. But when citizenry and law emerged (at T2) and become involved in new (as in both distinctive and novel) moral relationships (NMRs) political obligation followed.³¹³

A first question is what moral and theoretical changes did subjection bring about. Firstly, moral agents were no longer just randomly brushing against each other but became linked - as citizens- in relationships [with each other and the law] that law organized in such ways that they all gained a set of rights and responsibilities (henceforth, in short, entitlements). Secondly, those new relationships added morally both to the wider moral context and to the moral dimension of participants, who become morally “more” than they were previous to subjection; individuals turned into

³¹³ To be clear, I hold these NMRs to be law’s creations but I do not “blame” the law for them, in the sense that they weren’t law’s willfully and intentionally committed acts. These NMR’s were a consequence of imposition at T1.

citizens. Thirdly, law assumed a regulative role, acting as arbitrator in the NMRs, with a view towards ensuring that all could enjoy and exercise theirs. I hold the first and third points to be the reasons behind the moral requirement to obey the law. Simply put, I believe political obligation to be the consequence of law bestowing and regulating our new packages of duties and entitlements. Obedience is then both a horizontal and vertical requirement: we owe it to each other so that we may all enjoy our new entitlements and be protected against trespasses, and we owe it to law because the law is what confers and secures them. Political obligation is not, to be clear, a direct consequence of the NMRs established following subjection; and it is not a by-product - that we became trapped into them does not count as a font of obligation, and obedience can't be argued to be the content of a duty to preserve these relationships, because there is no such *qua* human responsibility. The moral requirement to obey is sourced then exclusively in law's intervention in the NMRs, to entrust with bundles of entitlements (to match the novel status of citizen), and protect them. These sets of entitlements are, in an important dimension, gifts from the law - after all, political rights and responsibilities are not natural, they exist only within the scope of state and legal codes- but in an even more important one they can and do exist only because of law's effort of *systematization*, the term I use to describe its arranging of moral agents (individually and within institutions) so that all may enjoy their entitlements and be prevented from interfering with the entitlements of others. Entrusting and systematization are why we owe law political obligation.

This paragraph could raise misgivings that I tie obligation to implicit claims from something's being good (in a moral sense) or profitable, in a construction that ignores CO2non-foundation-justice/quality and the observed fact that usefulness and balance of reasons arguments do not source a requirement to obey. I do not. There is a distinction to be made here between what we owe those that foist things- good, profitable or otherwise- on us and what is owed to law as the moral agent that bestows and oversees entitlements in the NMRs. We do not owe law obedience for creating those relationships, morally valuable and useful as they may be. I recognize the second point above as irrelevant to the existence of political obligation; that we are more morally as citizen members is just an empirical observation, not a purported source of duty. My account exclusively ties obligation to the way law systematizes everything so that a) all will be awarded a set of rights and responsibilities, b) all will be allowed and able to maintain and exercise their entitlements and c) all will be

prevented from wounding others in their entitlements³¹⁴. In other words, no one is owed political obligation because they transformed a group of random individuals into a citizen body, or because individuals gained an additional moral dimension in consequence to their having created NMRs. Political obligation is a right-against law has entirely because of its actions within the citizen group. Moreover, my claims should not be interpreted as an open or implicit contention that we are better off as members of those new moral relationships, that subjection is preferable to natural freedom or that obedience is profitable and utility enhancing. Obedience here is not thought to derive from the fact that we stand to benefit if we comply with law's demands. It is just what is morally required so that all may preserve their entitlements and be protected, and what is owed to law as conferrer and regulator. No duty of state entry is covertly marshalled and it is not denied that life outside the state may be superior- in every aspect- to life as citizens, or that disobedience may at times be more conducive to profit. Benefiting is not held to be determinant to obedience.³¹⁵

Insofar as I admit that T1 was an act of aggression and do not deny the possibility and existence of political obligation in spite of the objectionable birth of those NMRs, one may counterargue that my argument is an overly ambitious thesis of authority. It's not. My argument does not miss the mark for justified political obligation because [piecemeal] obedience is not something law/authority is held to "earn" or "deserve" because of its inclusive, democratic practices on an "it is as it is logic". And, in spite of inability to morally cleanse that moment of transition from T0 to T2, obedience is not owed to law as a tolerated and tolerable *Caesar* that means well. Submission, corresponding to political obligation, is what is owed to law because it acts as arbiter and because it bestows entitlements, entitlements that do not matter for political obligation, even if they arguably are determinant to our lives, how we interact, what expectations, aims, opinions we can have and hold.³¹⁶ The law is then in possession of an authentic power-right, not of a weaker claim right resulting

³¹⁴ I hold all our political entitlements to flow from the law inasmuch as they could not exist outside of law's effort of systematization.

³¹⁵ This account is not akin to the principle of fairness justification because political entitlements are neither *stricto sensu* goods nor obviously good in the sense of beneficial. And they are not the results of cooperation between individuals who neither make them possible nor can eliminate them (at most they can prevent others from exercising them but never from holding them).

³¹⁶ Though, to be clear, the fact that those entitlements matter is not directly or indirectly determinant to political obligation. They may be necessary for "acceptable social and political lives, pace Klosko, but their being potentially important and necessary is irrelevant to duty: we owe because law gave and regulated, not because law gave us meaningful things.

from its “worthy” structure or functions. We do not owe law not because it properly manages (supposedly) good things imposed on us from above.

I say “imposed from above” because a third worry one may have is that I allow law to foist and then legitimize its demands on the basis that it performs its coordinating functions proficiently. Again, I do not. To begin with, imposing (authority, subjection, new moral relationships) is not really an act of the law. A better view on political history would be one that acknowledges law-makers as those imposing citizenship and law on us, without permission, at T1. That forced the law to draw us into two separate layers of relationships, the first layer, one-on-one, moral agent to moral agent, the second layer, as regulator and conferrer of new entitlements pertaining to the separate connections it established between citizens. Less convolutedly, a consequence of imposition was that moral relationships doubled: if prior there were only *qua* human interactions and owing, afterwards people interacted/owed both *qua* moral agents and *qua* citizens, and not just with/to each other, but with/to the new moral agent “the law” as well, consequently owed both in its capacity of fellow moral agent, and as a holder of a right-against. All of this however is what law had to do following an original act of aggression that is not its fault.

Secondly, as mentioned, we do not owe law because it created NMRs between individuals; we owe it for the way it created and awarded entitlements, and then used its tool to safeguard them within those new moral relationship. When I reference law’s regulatory role then I am not concerned with the mundane, practical aspects of order keeping, but with the way law organizes everyone- and its individual parts, laws- so that it be possible for rights and responsibilities to exist and be protected. I reject then counterclaims that obligation is mistakenly identified as flowing from efficient management because management- no matter how competent or incompetent- is not what is determinant to obligation. Political obligation is not held to be a privilege earned in the wake of well performed coordinating functions, but a consequence of law’s conscious systematizing of participants [in moral-political relationships], itself, and legal rules in a way that allows and facilitates the oft-invoked entitlements to exist, be put in practice, be kept safe. The difference between what I hold the law to do here and law’s orthodox coordinating role is then the difference between sweeping a marbled floor and playing chess. Individual laws may be tools of day-by-day management; but the law itself is not a mere administrator. It

is the visible hand that arranges the pieces in a logic of rights and obligations it establishes and regulates.

A penultimate issue one may have is a possible question of content [of purported obligation]. It would be thought a charge both unwarranted and weak. On this account what we owe law is definitely obedience because owing here is not a question of appropriate repayments, and what they may be, or a question of content of duty, and what it may be, but what is morally and practically required so that law may keep everyone in place and therefore able to have, enjoy and exercise their entitlements. Within the perimeter designated by the newly established moral relationships law creates a structure of roles, rights and responsibilities that rests on a foundation of compliance. Obedience is then what makes entitlements possible, what gives them concrete meaning and significance and what maintains the *status quo*. Without compliance the structure would be levelled, as every aspect of it is contingent on compliance; and I am not referring to a practical contingency (we don't obey the law, our entitlements are jeopardized until they finally become purely theoretical) but to a congenital one: these entitlements were designed around the idea that citizens would and must obey, and therefore they cannot exist if they do not obey. Thus, compliance is not at the core, it is the core, in its absence political rights and responsibilities being unintelligible at best, and non-existent, at worst.

Finally, concerns that my distinction between the law/laws may have negative implications for my finding of legitimate political authority (in the sense that a duty to obey *the law* may not translate as a moral requirement to abide by *laws*) ought to be addressed too. These misgivings are equally unwarranted. Firstly, legitimate political authority is understood as [*de jure*] political authority correlative to political obligation defined as a moral requirement to obey *the law*. Having argued throughout for submission to *the law* linguistic standards alone deny hesitations. Secondly, differentiating between *the law* as a moral entity and agent, and the law as a sum of legal rules was my way of underlying that more can be said about law, in a moral sense, than what we normally do when claiming it to be moral. That discrimination however is neither absolute nor necessary. I recognized the law as, in one perspective, indistinguishable from laws- therefore all conclusions about *the law* apply to laws as well. But something else intervenes here as well- our ordinary way of thinking/speaking about moral entities. We do not reach conclusions about them and then deny they apply to their individual parts as well: we do not award people moral

charge but deny it to their limbs (medical ethics best defends this); we do not deem The Queen legitimate sovereign but deny this has consequences for her physical body or awards it special abilities; and we do not hold Hobbes' contract to justify subjection to the Sovereign but not submission to laws. Thirdly, if somehow the legitimacy of *laws* were distinguishable from the legitimacy of *the law*, the authoritativeness condition of political obligation would come into play and resolve all issues: political obligations entails having to do what *the law* demands because *the law* demands it, meaning that *the law* could be argued to request compliance with each of its individual directives; then political obligation would be a property of *the law* while obedience towards particular laws would be justified on the condition invoked. These three counterclaims are however rendered useless by the theoretical fact that the thought on political obligation does not allow distinguishing between the moral obligativity of law, and the obligativity of laws taken individually, or between legitimate political authority and the obligativity of law/laws. *De jure*, fully legitimate political authority is authority in possession of political obligation and political obligation means that all the commands of the corresponding authority must be obeyed. Thus, a vindicated moral requirement to obey sanctions submission towards all law, be it taken together or as a sum of legal rules.

We have seen thus that we owe law compliance on three separate levels: first, very limitedly, as a manifestation of consideration for a fellow moral agent; secondly, piecemeal, as the attitude towards an authority with a claim to submission backed by positivisation functioning as a thesis of authority; and thirdly, as the content of political obligation. Now it is time to see if this account of the moral requirement to obey meets the standards set in the methodology.

Political Obligation or Natural Duty?

The repeated usage of moral terms, the initial discussion on the types of duty the law can be owed as a moral entity, the general moral framework within which this account is developed, the apparent "big statement" about the nature of law, and instinctive concerns that an account that rests on an argument from bestowed political

rights and entitlements we recognize as belonging to everyone will struggle earnestly with meeting the particularity requirement might encourage assumptions that this is a typical natural duty construction. On the contrary, I hold this justification to be a plain non-voluntary account of political obligation.

That this account is non-voluntary and why it is so is manifest – no claims to anything resembling a willingly, deliberately performed action have been made whatsoever. It should also be clear that this account makes no reference to any natural duty whose satisfaction requires obedience: in this account, compliance with the demands of law is not held to be the exclusive avenue towards the fulfilment of a duty towards those institutions held to apply. We do not obey because we seek to fulfil some *qua* human duty, or because the law delivers something valuable in commendable fashion and therefore triggers a specific response in us.³¹⁷ Finally, as far as “big statements” go, the claim that law is moral in nature is neither bold nor objectionable, counterintuitive, or unendorsed by evidence and, most importantly, is not held to be the direct source of political obligation. So our opinion in the nature of law does not include us in the natural duty category any more than our non-voluntarism does.

What this account of account of political obligation may however appear to share with natural duties is a struggle with the particularity requirement that is uncharacteristic of political obligation justifications. Why particularity was never a problem for classic justifications of political obligation is no mystery: consent was supposedly given to the set of institutions X in clear, intentional and deliberate form, benefits were derived from cooperation with citizen group X, thus ensuring that both rights and burdens were owed to/owned by very specific groups of people: membership from birth could only be in one particular group X, gratitude was owed to state X, and so on. The ability rapidly and easily to show particularity, however, is not symptomatic of natural duty justifications, but the unfortunate consequence of inching further and further away from either clear voluntarism, or from more straightforward claims about special group relationships. It may seem that efforts to prove some generality automatically commit us to sacrificing a lot of particularity. Our recent experiences with modern, more fluid, accounts of obedience have nevertheless shown that particularity is not something that can be forfeited. As we

³¹⁷ The possibility of supra-determination has to be taken into account, in the sense that we must acknowledge that an action may have more than one set of moral reasons endorsing it.

understood from the case of natural duty accounts, the consequences of sacrifice are fatal. Recall that the two main criticisms marshalled against those accounts were, firstly, the uniform inability to show that states have genuine authority over their citizens and borders (beyond that which something like the normal justification thesis can account for) and are not just victimizing some set of individuals by holding them captive and denying them authentic possibilities of escape and alternative supply, and, secondly, that all their attempts to restrict applications to certain subsets of people by appealing to arguments from birth, proximity and efficiency failed because they awarded unjustifiable amounts of significance to random facts of birth, ignored historical wrongs or entertained tenuous relationships with reality, be it present or past. Particularity demands solid proof if theoretical possibility is to be narrowed down to concrete, individualised application, and it would seem that an account that argues for obedience on the basis of political entitlements that are universally held- in the sense that everyone has then-may appear to struggle with the fact of jurisdictions. And that is not the only issue. I've also argued the law, in the indistinguishable sense, to consist significantly of positivised moral norms in consequence to positivisation. As I do not hold the process to be determinant to political obligation *per se*, this does not threaten my account. But insofar as I do consider positivisation to be akin to a thesis of authority, and, more importantly, in itself a statement about [the content] of moral law, some further discussion regarding the issue of precise districting/inclusion is needed. Specifically, we need to see claims of positivisation not to affect the ability to restrict the application of moral law.

Particularity

The issue of particularity is then two-fold. *Stricto sensu* as criterion for political obligation, C6 particularity is not, in spite of appearances, much of an issue, three things guaranteeing it here. The first guarantee is the fact that trapping under new moral relationship is done with great precision. Law groups together specific individuals covering specific territories and ties them into networks of relationships with itself and with each other; law, the moral entity and agent, thus keeps itself and its particular partners within its own borders. Secondly, particularity is also assured (I

would say sufficiently) by law's own perimeter of activities and demands: although law, as a moral entity, may in this capacity interact with all other moral entities, and although the morality in its parts may exceed jurisdictions, political obligation is a claim and entitlement only against those it chooses to engage in the NMRs, and selects for bestowing with political rights and responsibilities. And in that – as well as in regulating them – law is very exact. Law's spheres of action and interest therefore protect particularity too. Finally, particularity is secured by law's effort of systematization. I argued that the law organizes moral agents, individually and as members of institutions, in ways that guarantee and protect entitlements; clearly in doing so it engages specific individuals, who thus come to entertain a morally correct special relationship with each other, as members of law's organizational structure, as reciprocal enablers of their entitlements, and as duty bearers.

None of these raise concerns about the possibility of moral wounds resulting from exclusions because a) everyone is engaged by their own law b) this argument does not hold law's actions to constitute or lead to some benefit or greater good from which outsiders could then be argue to be removed and c) particularity is not resolved with an argument from birth, proximity or efficiency, all of which are irrelevant to the special relationship. C6particularity as a criterion of political obligation meets. *Ceteris paribus*, the content of law, and whether or not it appeals to all those held to be obligated, becomes a non-issue: independently of content, opinions and moral beliefs, selected citizens must comply because law selected them for relationships, entitlements and systematization.

The only remaining issue then is one of correct districting-inclusion arising out of the possibility that insiders looking out/outsideers looking in and recognizing law that also - or better - reflects their own moral beliefs may be morally harmed when told to "stay in their lane" and obey only applicable law. Packed in these lines are three separate problems: a) an already resolved one with insiders, who have to obey their law, exclusively, because of the reasons mentioned above when defending C6particularity, b) a general issue arising out of orthodox opinions that moral principles are universal in scope and therefore render positivised moral law irreconcilable with morally correct restrictions in applications and c) a theoretical concern that content in moral law that appeals to outsiders may impose compliance on them as well. The second one is an obstacle only for positivisation functioning as a

thesis of authority, the third seemingly for political obligation also but in reality for neither.

Positivisation can district whatever compliance it manages to impose as a thesis of authority on an argument from “local moralities”, an idea that is compatible with both universalist and relativist perspectives on morality. There is no space here for more than a perfunctory treatment of either. However, the goal here is not to espouse their merits or isolate their faults, but to show that both allow for sufficient specificity for precise, correct districting/inclusion to be possible.

Moral relativism is an opinion that “one’s moral culture is the touchstone of moral truth and falsity when it comes to questions of right and wrong”, that “moral truth or justification is relative to a culture of society”.³¹⁸ It rejects the beliefs that there is such a thing as a “single, true morality” shared by all, or that there are moral norms universally held to be valid and regulating; instead, it defends districted moral codes belonging to each and every culture.³¹⁹ Moral relativism is also heavily reliant on the issue of conflict – it presupposes there are deep and permanent clashes between the different moral norms that permeate societies –³²⁰ and focuses on the hitches of moral judgment, which relativists seek to resolve by demonstrating that moral evaluations are neither absolutely truthful nor absolutely false, neither correct nor wrong, but contingent on “the traditions, convictions or practices of a group of persons”.³²¹ All in all, moral relativism presents as a claim to “irrevocable variations” in moral standards and statements, a rejection of moral verdicts with pretences of universal validity and an invitation to acknowledge that our way of speaking and thinking about morality is not necessarily shared by those brought up outside of our own cultural sphere.³²² Conflict, context and contingency are thus *les paroles du jour* when it comes to moral relativisms.³²³

³¹⁸ M. Timmons, *Moral Theory*, Rowman and Littlefield, Plymouth, 2010, p. 42; C. Gowans, “Moral Relativism”, *Stanford Encyclopedia of Philosophy*, 2015, p. 1 (printed version).

³¹⁹ Timmons, *Moral Theory*, p. 43.

³²⁰ *Ibid.*, p. 47.

³²¹ Gowans, “Moral Relativism”, p.3.

³²² K. Quintelier, D. De Smet, D. Fessler, “The Moral Universalism-Relativism debate”, *Klesis- Revue Philosophique*, No. 27, 2013, pp. 211-262, p. 216.

³²³ Moral relativism is particularly popular among communitarians and defenders of group rights. Communitarians, for example, have expressed their convictions that “standards of justice” are context-related and heavily determined by societal norms and ways. People such as Taylor (1985), Walzer (1983, 1987, 1994), Benhabib (1992), etc. have all agreed that moral judgments extrapolated from the frameworks in which they were made may be unintelligible and meaningless, given that they were

Moral relativism, such as it is, appears to be the easy way out of any problems of particularity brought about by positivisation. If there are no universal moral norms and morality is something neatly circumscribed within the spaces occupied by each and every culture then it follows, *ceteris paribus*, that the particularity requirement is not jeopardized because law shares into the same moral nature as the locals and positivises whatever moral norms are accepted and employed in situ. It is – at least on surface – as neat a justification for particularity as consent or benefaction once were: if morality is compartmented then the law that embodies and uses it is as well, and so is its application. Restriction thus becomes a non-issue.

Naturally, on the practical side, the situation is not as clear-cut: cultures do not always perfectly overlap with jurisdictions, two or more cultures can exist in the same space and globalization has had a heavy hand in pushing towards homogenization. And though the latter could be brushed aside with arguments that globalization has left enough/sufficient particularity for this justification to be true, dealing with the first issues is not as easy. The fact that national borders do not always reflect cultural ones is a fact of the modern world, especially in places where state lines are not “natural” consequences of historical progression. And while problems arising from the cohabitation of two or more cultures in a single space could probably be resolved by arguments that particularity is met as long as law positivises what moral norms they have in common (or on the basis of majority moral opinion) and awards special consideration and protection to minority cultures and their moral convictions, the issue of spill-over is harder to deal with.

But not impossible. One could maintain that spill-overs can be accounted for by the type of arguments we have made above, i.e. majority opinion plus minority protection. Or, one could argue that even though birth and ancestry confirm some people as belonging to a culture X, growth, development and the typical brainwashing associated to prolonged existence amidst group Y, are bound to create enough integration to confirm them as members of its culture, moral attachments and all, and therefore bound to the adopting culture’s moral laws. Or one very committed to moral

determinately influenced by the contexts themselves. They have also criticized Rawls and liberalism’s “atomistic tendencies”. Instead, communitarians seek to defend valuable forms of community. In similar fashion, advocates of group rights, use moral relativism to promote tolerance towards minority ethnic, religious or cultural groups who struggle against larger cultures threatening their ways of life, traditions, values and so on. In those scenarios moral relativism acts as both a shield against trends of cultural homogenization dictated by majorities.

relativism could argue that non-integrated spill-overs and minority cultures are not affected obedience wise by law's practice of positivising norms, which is entirely inconsequential, given the accompanying argument for political obligation. Keeping in mind that these sorts of situations will be the exception rather than the rule in the actual world, moral relativism still serves us well: for an overwhelming majority of typical cases, this perspective on morality will ensure districting; for the others, solutions are possible. Moral relativism thus presents as a wise commitment conducive to particularized compliance with *de facto* authority.

Moral relativism may not, however, be a commitment that people are willing to make.³²⁴ It presents with some unpalatable drawbacks, such as robbing us of permission to perform moral evaluations or forcing us, in the name of respect for diversity, to ignore atrocities and other major transgressions against other human beings.³²⁵ As Levy pointed out, if we accept moral relativism's premises then there is no authorization and no method to discover if some sets of moral standards are objectively better than others and we are left without "principled means" to evaluate and condemn outrageous events in history.³²⁶ Additionally, it is not at all obvious that moral relativism can protect the worse-off, the very groups it purported to champion, a point upon which feminist political theorists have insisted.³²⁷ An obvious problem with moral relativism is that it forces us to protect not only inoffensive minority groups but also those that "traditionally" hurt vulnerable sub-sets of people. Moral universalism, pushy and homogenizing as it is, shields the "victims" of history in a way that moral relativism cannot replicate.³²⁸ Finally, moral relativism appears to be less than favourable to moral discussion and moral progress, given its lack of explanatory power, of justificatory power, and its refusal to make a thrust for moral

³²⁴ We refer here only to real-life consequences, not to theoretical issues. For those see D. Lyons, "Ethical Relativism and the Problem of Incoherence" or T. Scanlon, "Fear of Relativism", P. Moser, Thomas Carson (ed.) *Moral Relativism: A Reader*, Oxford University Press, New York, 2001, pp. 127-142; pp. 142-165; also see Paul Boghossian, "The Maze of Moral Relativism", *The New York Times*, July 24th, 2011.

³²⁵ Timmons, *Moral Theory*, p. 61.

³²⁶ N. Levy, *Moral Relativism: A Short Introduction*, One World Publications, London, 2002, pp. 23-26. Rachels agreed – moral relativism ultimately serves malign practices because it covers and legitimizes them with the argument from tolerance. See J. Rachels, "The Challenge of Cultural Relativism", P. Moser, T. Carson, *Moral Relativism: A Reader*, Oxford University Press, New York, 2001, pp. 53-69, pp. 57-58.

³²⁷ S. Moller Okin, "Feminism, Women's Human Rights and Cultural Differences", *Hypatia*, Vol. 13, No.2, 1998, pp. 32-52; S.M. Okin, "Feminism and Multiculturalism: Some Tensions", *Ethics*, Vol. 108, No.4, 1998, pp. 661-684; M. Nussbaum, *Sex and Social Justice*, Oxford University Press, Oxford, 1999.

³²⁸ See for example the discussions between Kukathas and feminist political theorists.

improvement.³²⁹

Moral universalism therefore, with all its many faults – including its practice of uniformization, its judgmental and evaluative stance, its commitment to treating humans as isolated individuals removed from context and relationships, its shaky tolerance of group behaviours it judges faulty, its tendency to split the world into the “right us” and “wrong them” is arguably the superior position, even if only for the fact that it offers more protection for the worse-off, that it permits and facilitates moral judgments that in turn allow us to spot and condemn great evil anywhere, that it encourages moral progress and dialogue.

As mentioned before, however, at first glance, moral universalism does not seem to help with issues of correct and precise districting/inclusion; in a world of universal moral principles, how do you narrow down obedience? The answer is that this is done by recognizing the fact that moral universalism is not poisonous to particularity and particularities, or the other way around, by acknowledging that a belief that (some) moral standards are recognized globally and considered to apply everywhere does not necessarily mean there cannot be something uniquely moral to each society. Much as was the case with “separation/separability”, “universalism” gives the impression that it rejects even the suggestion there may be something particularized about societies morally speaking. This is not so. Important moral universalists have accepted that the theory suffers particularities.³³⁰ Of them, Martha Nussbaum is most useful to us. She has taken to defend the idea that there can be moral differences, moral evaluations and tolerance even within a morally universalist context. In her view, particularities, “context sensitivities”, do not necessarily commit us to moral relativism. Like moral relativists, she accepts that our beliefs, traditions, structures, experiences shape our particularized decisions, our world views, our universes in all of their aspects but, in a universalist vein, she holds that “world interpretations” are comparable³³¹ and believes in “cross cultural communication” on

³²⁹ Levy and Timmons both argue this about moral relativism.

³³⁰ Levy and Rachels, for example, both agree that that moral values and beliefs are routinely shared and that the incidence of moral disagreement is exaggerated. See Levy, *Moral Relativism: A Short Introduction*, p. 50 and Rachels, “The Challenge of Cultural Relativism”, p. 59. And, on the other side of the coin, communitarians/relativists have admitted to the existence of a “minimal and universal moral code”. See M. Walzer, *Interpretation and Social Criticism*, Harvard University Press, Harvard, 1987, p. 24.

³³¹ M. Nussbaum, “Non Relative Virtues: An Aristotelian Approach”, M. Nussbaum, A. Sen, *The Quality of Life*, Oxford University Press, Oxford, 1993, p. 261 (pdf.). In simpler terms, Nussbaum

matters of moral importance that allows us to recognize some of the experiences of others as similar to our own, to understand them, “to be moved by them”³³², to debate them and finally accept them as “ubiquitous facts of contemporary life” indicative of the fact that whatever discrepancies, differences, conflicts are present, a background of commonality exists. Thus, Nussbaum, discovers a set of moral norms that are universal in application and hold alongside different corresponding beliefs/behaviours that are particular to the society that generates them.

Her opinion is the golden mean. On the one hand, it recognizes the immediate obviousness that moral discourse is not identical, that non-identical behaviours can and are attached to the same conception of the “right” or of the valuable. It also acknowledges, however, that there are moral principles, standards and rules that all humans everywhere consider right and binding, that comparisons – even those generating negative results – are not always impossible or an instance of liberal Jacobinism. The merit of her opinion, therefore, is that she manages to reconcile these apparent inconsistencies into something easy to digest: context sensitive universalism, a novel fashioning of the same old school into something that allows for the existence of universal moral rules but at the same time is more openly acknowledging of the fact that beliefs, behaviours, conceptions of right and wrong are culturally shaped in very important ways. This is then the position we adopt as our own. Either conception of morality therefore allows positivisation to observe particularity and practice correct districting/inclusion.

The third problem is a concern that neither relativist nor universalist views on morality preclude the possibility that contextualized moral opinions and requirements may impose not only on those addressed by positivisation but on all outsiders that share the beliefs, discover the truth or otherwise accept the content of prescriptions as their own moral attitudes. Insofar as positivisation counts here not only as a thesis of authority but also as a statement about the content of law in the indistinguishable sense, this could be thought to affect my argument for political obligation as well.

It is a false obstacle for political obligation. The account does not hold compliance in any way contingent on the content of moral law, or on adherence to the moral code in law; it remains faithful to the directive not to allow the letter of law to

agrees that societies (and individuals in societies) “do their own” but, simultaneously, she denies that contrasts or judgments of “these owns” are impossible or necessarily intolerant.

³³² Nussbaum, “Non Relative Virtues: An Aristotelian Approach”, p. 262.

be determinant to the requirement to obey. This makes non-problematic the fact that normative system law will contain propositions based on principles that are all-encompassing in hold, and other regarding in ways that exceed legal borders. Take justice, for example, an integral part of whichever set of moral beliefs and legal code one chooses to inspect. All humans are held to have some duty of justice – or something that mimics our generic concept of it –*qua* humans, independently of jurisdictional affiliation. When considerations of justice arise therefore most people will experience a “tug” and will, in fact, owe something (it does not pay to speculate what) in its direction to fellow citizens, to outsiders or to both. What they will not owe to either, because of these considerations of justice, is compliance as political obligation however. To be clear, they will have to abide by laws aiming at, instilling or actuating justice but the mandatory nature of those legal proposition will be rooted in the fact that they are rules imposed by law in possession of a right against, not in their being conducive to the realization of justice, or their producing morally pleasing effects. This is key: justice might make demands of people that embrace the principle and people may need to abide by them *qua* humans charged with some duty of justice. But those demands remain firmly in the land of “oughts”. As always, moral principles cannot and do not create political obligations - not even when they have been selected for positivisation into legal rules. Justice, therefore, remains part of the goals the law tries to achieve through its package of rules; it never moves forward to becoming the source of a right to submission (a fact best seen in the previous chapter). The same goes for all other principles. In these conditions, even if the community of believers exceeded state borders, if indexed moral principles aimed to impose duty on all those that embrace them, or even if the community wanted to push its moral code further than state lines, political obligation, would still be particularized. The content of moral law is therefore not an obstacle.

When it comes to positivisation as a thesis of authority however things are not as clear-cut. Positivisation does marshal compliance simple as resulting from the content of moral law, though not in the sense of “I have to comply because I adhere to the moral principles I discover in law” but in the sense “the practice of incorporations has led to me and law to sharing a moral code”. Still, given my previous contentions that there are sufficient moral peculiarities about each culture to guarantee particularity, I believe the thesis can restrict application; insiders will be linked through commonality, outsider excluded rightfully on the idea that their own law will

also include those moral principles they recognized elsewhere, and more of what and how they believe than any other foreign legal system. The health of the thesis of authority does not matter though. What is important is that the practice of positivisation not negatively impact obedience on political obligation and I believe this discussion shows that it does not.

As a final theoretical point, claims from moral codes shared between law/institutions and citizen bodies would not solve the particularity problem for natural duty constructions, primarily because, for them, what law is and how it interacts with citizens, is irrelevant. They do not approach law or citizens as special in a relevant sense, they do not see the law-citizen relationships as such, and therefore do not seek to vindicate this “specialness” it. So, for them, a justification that incorporates my claim would read along the lines “people have a natural duty of justice predicated on them complying with the law of their institutions that positivise their own moral set of beliefs”. It may not be obviously offensive but, broken down, it is unintelligible – either you see law/institutions as special in a relevant sense (here a consequence of citizens and law sharing moral beliefs), in which case appeals to overarching, universal, natural justice become awkward, or you do not, and they are mere tools employed towards the satisfaction of a purpose, in which case positivisation speaks of a practice that could be claimed efficient- insofar as laws positivising justice are obviously conducive to its realization- but particularity remains unresolved, since arguments from the scope of effectiveness are inconsequential to it. Moreover, one cannot hold people to be under an universal, natural duty, and then claim restrictions in applications are justified by law’s positivising that duty and leave it at that because all law, everywhere does that meaning you still have no morally correct answers for exclusion and precise districting. Claims of particularity would be a little more credible if it were argued that the concept of justice positivised into law looks a little different in each culture (and application consequently claimed to be limited by that) but that opens one to counterarguments that a) those that have to make due with a lesser conception of justice are incorrectly excluded, b) the idea of a “natural duty” loses some of its significance, as that duty looks a bit different everywhere and, above all, c) you make the issue of content even worse, as it becomes harder to claim that the realization of

all understandings of justice, everywhere, are exclusively contingent on one unique manifestation- compliance.

Limits of Positivism: Disobedience, *Prima Facie*

Character

Insofar I marshal a conception of law, in the indistinguishable sense, as consisting most significantly of positivised moral norms, my construction could be seen as challenging CO7_{not-too-much-duty}: if the moral principles that apply to us (as individuals), are held to apply to us, and apply to our moral group are positivised into law, there is a danger that law may come to overstep- by which I mean that law may come to make demands that go beyond what is necessary for it to be able to perform its functions and secure our duties and entitlements. This opinion on law could thus expose citizens, [most of all those belonging to protected classes] to a series of risks. Three quickly reveal themselves: a) the legal results of positivism may come to trespass against freedom, autonomy and the general pursuit of happiness; b) the argument does not account for moral variety and moral dissent; c) the argument assumes law will keep up with changes in moral perspective and vice-versa when that may not always be the case. In order to meet these concerns head on, some limits will need to be placed on positivism so as to ensure that law does not offend and wound, especially those who depart, to any significant degree, from popular, majoritarian morality.

Clearly boundaries of positivism are already in place. Constitutions enumerating the rights, liberties, freedoms and possessions of citizens, and setting the principles according to which all political acts, including legislating, must be performed act as a first limit, ensuring that whatever ensues from positivism not only safeguards but also does not in any way harm the rights and duties of citizens. The charter of human rights, as well as international conventions, other forms of supranational law, international courts, etc. are additional safeguards, further reinforcing the fact that positivism must be mindful and protective of the awards persons receive in virtue of their own humanity. In addition, other, lower ranking, packages of law, carry some of the same burden. But they [altogether] may not be enough, or quick acting enough, or accessible enough, or authoritative enough to

prevent all deviations. The obvious concern here is that positivisers may be tempted to [or actually] make into law moral norms of dubious or debatable worth or level of endorsement (for example those concerning the roles, behaviours or duties of women, those rejecting homosexuality as “wrong”, those restricting the notion of family to the traditional one man-one woman-x number of children formula and so on). In this perspective, this understanding of law and the accompanying account of political obligation could appear problematic at best and toxic at worst to the demands, concerns and well-being of “traditionally” endangered groups, if not downright justificatory of illiberal practices. This is not so, however. To begin with, we need to remember that there is a hierarchy of moral principles, with the highest order ones making it into law as the basic principles of equality, autonomy, freedom(s), pursuit of happiness, and so on. These considerably outrank and *out-worth* any dubious moral standard, meaning that any conflicts will be resolved in their favour. Those higher order principles (moral but also legal) should ensure that positivising questionable standards is impossible, as it would either produce lower-ranking rules that would conflict with the superseding principles in organic law, bringing about legal woes, or degenerate in the utter dissonance that would be involved in embracing the right standards while at the same time restricting or outright denying rights to certain categories of citizens. Additionally, those higher-order legal, moral and constitutional principles have corrective prerogatives as well, meaning that in places where situations as those described above arise they compel legislators to eliminate those parts of law that wound them. In other words, the hierarchy of principles in the moral domain reflects in positivised law, with superior ones retaining their regulative functions.

Of course, as always, the gap between “should” and “does” can be significant, but that is the fault of practice, not the fault of theory: the theoretical space and the instruments for control and corrections exist. In addition, as moral relativism instructs, we should also be mindful of the fact that while our own standards and beliefs may push us into kneejerk assignments of fault and blame and evaluations of correctitude, given the notable degree of context dependency of morality, and the fact that commonly shared virtues may inspire and sanction radically different behaviours, legal norms that fail our moral inspections need not necessarily fail the inspection of those that produced them, or are subjected to them.

As far as the second issue is concerned, it is far more problematic to theory than

to reality. In practice, the number of people who will depart so significantly from the moral code reflected in their legal system that obedience would destroy reflective equilibrium is probably infinitesimal; the “brainwashing” effect of living in that society amongst community members accepting of that code, being raised by parents that abide by it and being constantly told – by the state, school, institutions, church, etc. that the code is “right” and correct” – is bound to keep it low, possibly as low as the number of people who would deny consent, or refuse to cooperate with a view towards benefaction, or disengage from situations of urgency. That being said, the few that could theoretically considerably disagree are not excused from obedience by the fact that the moral norms in legal rules do not hold for them, personally. Disagreement on moral issues does not have an obvious negative impact on applicability, especially when the interests and well-being of others are at stake. Here, the claim that the morality in law is the morality in heart is one step on the ladder towards obedience as the content of political obligation, but while we could agree that those that depart significantly may not “climb” on this particular rung, obedience is not at all jeopardized: moral principle retains regulative capacity in spite of opposition and, above all, law still retains political obligation. Hence reasonable disobedience is the only disobedience these individuals have access to.

Finally, regarding the third expressed worry, it is true that there are cases in which parts of the law do not reflect the moral principles embraced by society. The two most likely reasons for this are either law’s failure to keep up with moral progress or moral change, or law-makers rushing into legislating on the basis of moral principles or convictions they have somehow misidentified as embraced by the majority of citizens. In liberal regimes, public discussion and public opinion are given substantial consideration so legislators are more attuned to citizen will and thus swifter to fix incongruities or mistakes; and with democracies ostensibly preoccupied with both individual and collective well-being and awarding equal consideration, all-out legislative mistakes are likely to have, on-average, more minor adverse effects. It should also be recalled, however, that, of all moral entities, law is the most stable, rooted and unvarying; attributes that have the advantage of making it an open and known quantity but also the disadvantage of making it conservative – it cannot exhibit great mutability when its aim is to avoid triggering moral objections from the majority, if claims to permanency are to be believable and the epistemological function is to be satisfied. Thus, provided that fundamental human or constitutional

rights and freedoms are not violated with pervasive, long-lasting, seriously damaging effects, in which cases disobedience would be justified, some allowance for discrepancy has to exist. But we must not lose sight of the fact that law has “parents”, who shoulder the blame for any wounds law may cause citizens. Consequently, in situations such as those described above, disobedience is not the immediately justified answer. Intermediate steps need to be taken, with the first and most important being citizen voters castigating and pressuring legislators into positivising according to their wishes and making sure that their desired legislative changes are inserted into public debate. Of course, non-liberal societies will not have – or have less of – these tools at their disposal. To the dissatisfied of those regimes we can extend the rights of reasonable disobedience and a helping hand provided that we feel compelled by Rawls’s second requirement of the natural duty of justice.

All in all, we have sufficient evidence in favour of thinking that neither my conception of law nor my account of political obligation cause more concern for the well-being and positive freedom of individuals than others. Between the self-regulating character of law, the hierarchy of principles and the corresponding hierarchy in law, the control elements and safety valves guaranteed by constitutions and legislative processes, and the democratic practices in place, there are no serious reasons to believe that they wound individual freedoms and autonomy more than other conceptions or justifications permit law to do.

This issue of too much duty obviously ties into the corollary concern that the account may come to deny access to reasonable disobedience, and, therefore, *ceteris paribus* ascribe to political obligation more than *prima facie* character. Compliance is, after all, seen here first as something owed to law- in a limited sense- as a manifestation of consideration for its opinions, interests and well-being, then, in another limited sense, because of positivisation’s functioning as a thesis of authority and, eventually, as a morally justified entitlement corresponding to a right against. Taken together with the fact that we’ve also stated that the other’s enjoyment of their own entitlements and duties is possible if we comply, disobedience may seem to be excluded from the realm of possibilities.

This is not so. The account allows as much access to reasonable disobedience as consent or principle of fairness paradigms: citizens have to obey up to the point when

superior moral considerations interfere and sanction alternative courses of action, or when law fails to perform its functions and begins to wound. Disobedience is thus permissible in exceptional circumstances (classic scenarios of stealing cars to save wounded people, etc.), when law no longer secures rights and responsibilities, when it acts contrary to the entitlements it provided, or when it wounds *qua* human rights.

Available disobedience and the limits placed on positivism ensure then that political obligation remains the *prima facie* duty of people not burdened with excessive or excessively demanding law. And neither positivism and law's trapping into NMRs, nor the way political obligation is justified make compliance more than first sight mandatory. Moral principles retain their regulative powers, and hierarchical rapports remain in the same at all times, meaning that a) lesser principles and laws based on them will not be allowed to conflict or threaten higher order ones, b) if they do happen to conflict higher principles and the corresponding peremptory rules will "win" and c) the relationship between the duty to obey and the duties attached to supererogatory requirements also stays identical – one of subordination. All in all, things are in homeostasis, this account allowing political obligation to continue inhabiting its habitual space: it can claim itself strong and permanent, even if, *de facto*, there will be occasions when duty will be invalidated by circumstances.

In this direction, the only difference ensuing from my claim that the law is moral and a moral agent is that disobedience becomes more of a "harm" than under earlier paradigms of political obligation. Recall that disobedience not sanctioned by exceptional circumstances was ordinarily though to be morally objectionable, impermissible, and harmful, in the double sense of "unfair" and "jeopardizing".³³³ Although I think Simmons to have made a valid point that the consequences of low-key, individual acts of disobedience are unlikely to be as detrimental as political theory contends, I still adhere to the classic outlook on disobedience as causing injury. My account makes the validity of that statement more obvious than previously. All disobedience produces harm, even in the most seemingly innocuous circumstances in which it appears, because in all scenarios in which our behaviours intersect with the domain of law and we ignore its demands, a potential victim is identified. That victim can be another member of the citizen body who, at the very least, is cheated in some sense, the larger group of citizens, or, importantly, the law itself, both as the holder of

³³³ Of others and their benefaction, or their well-being, or their interests and opinions, etc.

the right to demand obedience and as a moral agent that entertains a relationship with us. In all instances when disobedience occurs, therefore the disobeyer behaves inappropriately towards another moral agent, minimally the law wounded in its right against. This has no consequences, practical or theoretical, for the amount of permitted disobedience, but it does show that disobedience, unless excused, is never a victimless, sans damage crime - someone always gets short-changed.

So far we have seen this account meet several of the requirements of a good account of political obligation: it proposes a single ground of obligation for a requirement to obey; it secures particularity, that great obstacle that neutralised almost all non-voluntary justifications, by arguing from a form of moral universalism that embraces localism and recognizes that shared universal values are consistent with typical behaviours, and the fact that law makes moral claims and traps into new relationships very specific people; it secures generality by establishing obedience as the general case for citizens; and it creates a space for reasonable disobedience that conserves political obligation's *prima facie* status as it recognizes normal hierarchical relationships between moral principles and between obligations and duties. Only two more issues need addressing.

The Authoritativeness and Epistemic Problems

This leaves us with two further issues to discuss regarding the level of success of this account as a justification of political obligation: whether it contributes something to the discussion on the territorial rights of states and whether or not its exclusive reliance on arguments from the morality of law and in law detracts in any way from the ability to identify and apply the very law that need be obeyed.

These are two problems inherited separately from Simmons and Raz. Concerning the first question, this account manages to state something successfully about the territorial rights of states and "boundaries of authority" almost as much any other successful voluntary or non-voluntary account of the moral requirement to obey could: something definitive about the latter, less about the former. Barring exercises in ideal theory, the best a justification of political obligation can hope to accomplish is

to show that, generally speaking, the born citizens of a certain state are bound to obey its laws. It cannot legitimize any history of state formation, or rectify historical wrongs, or forever preclude any instance of territorial breaches; and it cannot morally sanitize history or even current political practice beyond proffering an explanation as to why, after the recognized random fact of “birth”, people have a duty to obey authorities. This account satisfies particularity and because of that it ties citizens to their applicable (in a morally justified sense) institutions without causing moral wounds.

The second issue – the epistemic problem – is more complicated and forces us to go back to the debate between ILP and ELP about the inclusion of moral principles into the criteria of legal validity. As we recall, the former are convinced it is healthy, theoretically accurate and inoffensive to the opinion that law and morality are separable to allow this insertion, while the others, spearheaded by Raz, are of the firm persuasion that any such decision would decimate a legal system’s claims to issuing authoritative demands (C5), as the NJT would be invalidated and the identification of law would come to depend on the same reasons “authoritative directives” had to pre-empt.³³⁴

The way ELP voices its concerns reveals that its qualms in respect to the incorporation thesis consists of two issues which are separable to all but those who ascribe to the NJT: a problem of legitimate authority and a problem of identification. The first must not be confused with an interrogation of the supposed duty to obey in our sense – it is only an expressed doubt that the opinion that laws are sometimes laws on the basis of moral worth exclusively is not poisonous to laws’ ability to meet the authoritativeness condition (people doing what the law commands because it is the law that commands it). The second, as the name suggests, is a concern that the inclusion of moral standards into the criteria of legal validity will prevent citizens and adjudicators from discerning applicable law. These two issues preoccupy us insofar as there are dangers than an account that relies on the moral nature of law may be a) interpreted as making obedience somehow predicated on processes of moral evaluation, or b) may hinder abilities to identify applicable rules.

Having said this, the discussion on these two objections can be conducted on two separate levels: the level of political theory and the level of legal theory, which

³³⁴ Brian Burge Hendrix, *Epistemic Uncertainty and Legal Theory*, Ashgate, Aldershot, 2008, p. 117.

requires further involvement in the debate between ILP and ELP.

In first terms, concerning the second issue of identification, it is naïve to assume that any theory of law, as any theory of political obligation, will have any sort of impact on the practical behaviours towards the law of average legal subjects. At this very moment, whatever might be the reasons why citizens obey the law, they certainly have nothing to do with any positioning on the positivist scale or any conviction that one justification of obligation or another is correct. No concept of law and no explanations of authority will entertain a genuine relationship of causality with public behaviours towards the law; and we have no evidence that knowledge about law can be traced back to theory. As such, no opinion on the criteria of legal validity, on the moral nature of law, on the source of obligation will have an actual impact on identification and obedience. In these conditions the question is purely theoretical: should there be such an enlightened citizen – or confused alien – that he may want to be instructed by academia on how to go about his efforts of identifying law, is there any possibility that this account of the requirement to obey may cause him to improperly identify law? The answer is no. Ultimately, it all comes to sources: for the masses, law is whatever bears the rubber stamp of those entitled to make law. Outside of erudite preoccupations in the corners of theory, on any account of political obligation existing, and on any account possible, the answer to the epistemic problem for the overwhelming majority of obeying citizens is that law *is* whatever rule authorities deliver through the proper, known channels. How people come to know the law in real life situations is another discussion (one filled with speculations) but still operating with the certainty that the source of knowledge is not theory.³³⁵ Jules Coleman was perfectly aware of this when he wrote that “by contrast [to officials] ordinary folk need not necessarily take the internal point of view towards the valid law under the rule of recognition”, a complicated way of saying that the rule of recognition serves an epistemic function only for those tasked with law-making,

³³⁵ People like Hayek noticed this. He wrote that, as long as citizens behave according to the demands of rules, it is not necessary for them to be “consciously aware” of them (p.99-100). He was content with much more than imperfect knowledge of the law on the side of citizens, his only epistemic requirement being that “general practices” be capable of creating and sustaining expectations in litigation (mostly), i.e. that they establish precedents (p.86). Hayek, however, did not believe that when these expectations were spurred some great imbalance had occurred as well. He recognized both the possibility of the end of knowledge on law, and the corresponding need for consultation, and the possibility of the end of law *tout court*, and the ensuing need to create new legislation, including by appeals to morals, customs, etc. See F. Hayek, *Law, Legislation and Liberty*, Routledge, London, 1998.

litigation, adjudication, etc.³³⁶ Consequently, if principles are part of the criteria of moral validity, and obligation is rooted in the moral nature of law, whatever problems they may cause for identification will only affect those who genuinely make use of the rule of recognition, i.e. not the general mass of uncritical law abiders that is the subject of political obligation.

Regarding the first issue of authoritativeness, in the terms of moral philosophy, we have clarified the statement “the law is moral” to be an assertion about the nature and essence of law, and its status as a moral agent, and we have attempted to derive obedience on the basis of this claim. However, “the law is moral” was not used as a euphemism for “the content of law is acceptable and utility producing”, and obedience was not something argued for by invoking the superior practical and moral consequences that ensue; obedience here is not the better option but as a special relationship. Thus, on this account, the reasons for obedience are not replaced with dependent ones, and duty bearers are neither encouraged nor permitted to compare and contrast possibilities. C5 meets.

From the perspective of legal theory, however, the issues are more complicated and require countering any actual or possible future suggestions that the argument from the moral nature of law, and the implicit allowance of moral principles into the criteria of legal validity, encourage evaluations that are incompatible with the automatic and un-deliberative process that is obedience, and with authority as a whole. We have already expressed an opinion about ELP as being ultimately self-serving, a branch of positivism seemingly less concerned with delivering an appealing and realistic portrait of law than with theorizing its nature in a way that does not jeopardize their thesis of authority. Still, the problem needs to be addressed on ELP’s own terms as well.

The first step in this direction is to see why exactly ELP is so adamantly against the incorporation thesis.³³⁷ Exclusive positivism is a radical position in its reading of Hart, in the firmness of its conviction that all law is source based, and in its interpretation of soft positivism’s inclusivist thesis that they regard as a far clearer and precise statement about the rule of recognition than either of its inclusivist proponents intended. To them, this permission given to moral principles occasionally to act as criteria of legal validity and dictate law is tantamount to an opinion that the rule of

³³⁶ Coleman, *The Practice of Principle*, p. 135.

³³⁷ The goal is to see if they have any legitimate misgiving besides their desire to protect the NJT.

recognition is either a straightforward claim that “all law is at its moral best/ is morally best”, or something vocal about its own superb moral competence.³³⁸ It is not. Neither Hart’s original text, nor his postscript, nor any other major piece of writing on legal positivism since, inclusive or otherwise, has stated the rule of recognition. We know the rule of recognition to establish the criteria of legal validity, to provide valid tests for law and to direct in its identification, but it is not a singular text of definitive form. It is a convention, a constitutive one as Andrei Marmor calls it, that produces uniformity in thought, practice and behaviour without being a singular item of firm, exact nature; the rule of recognition is a sum of many things, not one precise statement.³³⁹ In other words, the rule of recognition is a list of generally but not definitively known things, whose content cannot be encapsulated in the kind of simple statement exclusive legal positivists believe their inclusive counterparts to make. Why this is in any way significant has to do with the fact that, depending on perspective, they are either overemphasizing ILP’s beliefs about the permission to incorporate moral principles into the rule of recognition and the consequences attached to it, or underemphasizing the complexity of the rule of recognition. It is far easier to argue against ILP as a position that precludes identification and non-vitiated claims to authority when you take them to mean that they consider the position on moral norms as criteria of legal validity to be *the* rule of recognition. If they actually held such an opinion ELP’s case would be stronger: should conformity to moral norms be the only – or supreme – condition of legal validity, identification and authority would be harder to satisfy, although not perhaps in the way or to the intensity exclusivists believe. If ILP genuinely held the rule of recognition to be a plain declaration that all law is *morally optimal* (phrase borrowed from Himma) then identification would be problematic, but not for regular citizens in an ordinary context, but in hard litigation and arbitration, especially for those on the deciding end.³⁴⁰ In this direction, ELP’s best argument against ILP’s thesis would be either that someday, somewhere some judge, lawmaker, legal authority, etc. will either not know how to navigate some impossibly difficult legal issue, and the rule of recognition will be of no help other

³³⁸ K. Einar Himma, “Bringing Hart and Raz to the Table: Coleman’s Compatibility Thesis”, *Oxford Journal of Legal Studies*, Vol. 21, No.4, 2001, pp. 609-627, 621-622.

³³⁹ Andrei Marmor, “Exclusive Legal Positivism”, J. Coleman, K. Einar Himma, and S. Shapiro (ed.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2004. Also see A. Marmor, A. Sarch, “The Nature of Law”, *Stanford Encyclopedia of Philosophy*.

³⁴⁰ For which the rule of recognition and criteria of legal validity mean nothing and could mean nothing because whatever knowledge they have of the law comes from direct contact with legal rules.

than instructing to opt for moral *bestness*, or that the same individuals will decide one way or another in a case with the only argument supporting their decision being “I have considered the issue and found my solution to be morally best”.³⁴¹

The presumed problem on this ELP interpretation of ILP is twofold: there is the real possibility of the rule of recognition proving to be useless, and there is an issue of negated authority brought about by the need to engage in moral evaluations in order to apply or make law. The former speaks about a very valid concern that a rule of recognition that banks on moral *bestness* is akin to an instruction manual that reads “use wisely”; most will, but not because the guide instructed them to do so in an explicit, clear and authoritative way, but because of other reasons compounded with expertise, consultation, sheer luck or accident. Similarly, a rule of recognition that reads “law is what is morally best” will make the identification of law and its application everything ELP sought to avoid: difficult, requiring of evaluations, confused and confusing. The latter (negated authority), on the other hand, would be a direct consequence of all these. Whether there would be a need to consider morally in order to discover the rule of recognition and what it demands/justifies, or to consider morally in order to discover reasons to comply, or all three, this allowing of moral norms to function as criteria of legal validity would strip authoritative commands of both their authoritative and commanding nature, as they would lose their automatic, unthinking, quality, while simultaneously robbing the rule of recognition of its conventional nature (as conventionality and evaluations are incompatible). Put more simply, authority cannot be the legitimate claim of a legal system where the rule of recognition invites efforts to discover morally optimal solutions rather than providing specific instructions.

Exclusive legal positivism’s aversion to the incorporation thesis is understandable when the problem is discussed in these terms. The crux of the issue obviously has to do with the rule of recognition. Yet that is a corner from which inclusive legal positivists can escape easily by rejecting Raz’s thesis and emphasizing that their permission to include is no more than a theoretical possibility. ELP’s sacrosanct theory of authority is a weaker justification for some beliefs states and legal systems have about themselves, and one that does not have the normative power

³⁴¹ Himma insists on this being a problem. See Himma, “Bringing Hart and Raz to the Table: Coleman’s Compatibility Thesis”, pp. 619-621.

accounts of political obligation do;³⁴² it is not about substantive facts or genuinely even substantive claims, but rather about the theoretical possibility of such claims backed by the NJT. Inclusive legal positivism is a problem for authority only for those that embrace Raz's own account, which is not obvious, obviously superior or any way genetically, congenitally or indelibly tied to positivism. ELP debates ILP as if the latter accepted its premise of the NJT, which is neither true nor necessary, since accounts of authority can meet the authoritativeness condition without banking on it. Marry ILP with any other justification of obligation and the problem instantly narrows down to a question of whether or not the incorporation thesis hinders law's ability to serve the epistemic function.

But here as well a significant part of the problem stems from ELP's myopic assumption that their inclusive counterparts place the incorporation thesis at the heart of the rule of recognition, or approach it as if the inclusion of moral norms into the criteria of legality *is* the essence of the rule. That is not so. Apart from those that regard inclusion as a necessity, the incorporation thesis is not held to be a "big statement" about the rule of recognition or some crucial feature. The thesis is an admission into which they were forced – justifiably so – by Dworkin's comments in *Law's Empire*, but it is an addendum, rather than a modification. As such, for ILP, it remains true that the rule of recognition is an unstated sum of many things that includes, among others, this one yielding that moral worth *could* be – not that is, not that it must be – a source of law, sometimes. It is an argument about a theoretical sufficiency restricted to some cases, not one that holds the incorporation thesis to be the sufficient content of the rule of recognition or a necessity. The rule of recognition for ILP is therefore not a simple claim that "all law is morally optimal/ law is whatever is morally best". If for ELP:

rule of recognition=+.....+.....+.....+.....+..... +..... .

Then for ILP:

rule of recognition=+.....+.....+.....+.....+..... +..... +
sometimes, moral principles.

Given this, even the issue of precluded identification, which, again, will not

³⁴² Or, arguably, even of functionalist/structuralist explanations of authority without political obligations.

affect average law abiders and run of the mill litigation and arbitration, is less of an issue for inclusive positivists. Stating that, occasionally, a law is a law because of its moral worth does not amount to saying that nothing but its superb moral credentials confirm its status of legal rule. In other words, independently of the reasons why a norm has become a legal law, there will always be more than one way to ascertain legal status. Other factors, minimally those having to do with pedigree, will interfere and confirm it. Coleman agrees. Although he does not mention what else could facilitate identification he points out in *The Practice of Principle* that the criteria of legal validity need not coincide with “the modes of identification”, that the content of the criteria have no obvious implications on identification, by which he means that no axiomatic statements can be made about the relationship between the two in the absence of empirical observations of legal practice.³⁴³ Thus, the only situations in which identification is likely to be a real issue are exceptional ones, when the adjudicator has exhausted all law and has to make new one.³⁴⁴ In those circumstances she might need to engage in moral consideration and appeal to moral norms in order to produce applicable, resolving legislation.

ELP will of course object to this opinion and the idea of new law from moral principles, but only because it once again threatens their theory of authority. The protestation will more likely be along the lines of “a rule of recognition that does not instruct specifically what to do in those difficult cases is not an authoritative rule of recognition”. Yet arguably it is and it does – it instructs the legal experts facing the conundrum to apply their best, most educated, legal opinion in an effort to come up with morally unobjectionable (or minimally so) solutions, i.e. to improvise to the best of their ability. Exclusive positivists need, therefore, to be more openly acknowledging of the rule’s limitations, as naturally no convention can or should ever be expected or believed to truly exhaust and cover all possible scenarios. Uncertainty is not going to be eliminated. Connectedly, if it is recognized that law ends, and judicial discretion is accepted, the theoretical possibility of a space past existing law that is the legal equivalent of “here be monsters” territory is accepted as well. We have no reason to suspect that a rule of recognition that tolerates moral criteria of

³⁴³ Coleman, *The Practice of Principle*, pp. 128-129.

³⁴⁴ This is not – or should not be – a proposition problematic for positivists, including exclusive ones, who accept judicial discretion and the contention that law ends (it would not be objectionable even to non-positivists like Dworkin who, even though rejecting judicial discretion and of the opinion that law never ends, accepted the fact that written legislation is sometimes insufficient and moral principles will needed to be accessed and argued from in order to discover new pieces of legislation).

validity will fare worse in those murky waters than ELP's source-obsessed rule; and we have little reason to think that an inclusive rule of recognition will navigate that situation in a way that will deprive the legal system of any of its authority, in any conception, or of efficiency; and we have equally few reasons to think that ELP's rule will fare better, moral principles being harder to exhaust than accepted sources. So, once again, we get at least partial confirmation that what is really objectionable about the incorporation thesis is its perceived negative effect on the justification of authority that Raz and supporters marshal.

As a point of general practice, Raz appears convinced that the efficiency of a system of rules (if not its entire existence) is contingent on officials being able to explain their decisions with appeals to law, legal standards and social facts exclusively. Kramer, however, proposes a convincing alternative view on existence and efficiency as predicated on generality, regularity, systematization and an ability to persuade that obedience should be a non-evaluative process.³⁴⁵ As for "officials", if asked to explain their actions, members of the executive and legislative branch could provide an explanation that need not go beyond a defence in moral terms with which the enquiring subject is familiar. The same argument can be extended to members of the judiciary: while they are always required to motivate their decisions, in all but the most exceptionally difficult cases they will be able to do so without appeals to the moral principles and standards that so bothered Raz. In the comparatively small number of occasion that they will face uncertainty, an argument invoking the norms of critical morality will be adequate because judge, defendant and other parties involved will all speak its language. Exclusive positivism, therefore, appears as a theory of law conditioning legality and the authority of law on perfect certainty, perfect intelligibility, and perfect fact-based explanations when that it is not the level at which we do, can or must operate; sufficiency is the bar for both, and ILP clears it.

As a final conclusion on this particular debate, ELP hammers in the opinions that inclusivity will indubitably lead to less authority, more uncertainty and more difficult adjudication. In practice, however, what we have is arguably less of their theoretical authority. I say, perhaps, because ELP's argument that incorporationism leads to blanket confusions between dependent reasons and the reasons in law is not something they have vindicated. Coleman counterclaimed that it is theoretically

³⁴⁵ M. Kramer, *In Defense of Legal Positivism: Law without Trimmings*, pp. 91-101, esp. 95-96.

possible for a legal system to exist in which this does not happen, and it is not one so far removed from ours that it lies at the outer limits of extreme possibilities.³⁴⁶ What matters most, however, is that, if confusion is to arise, it will most likely be limited to exceptionally difficult legal conundrums, the kind in which the decider, having exhausted all knowledge and sources of law will have to exercise judicial discretion. It is a dubious practice to deny that a judge in that scenario appeals to moral principles. And while for her, reasons might coincide, as soon as the decision is made those affected or subjected will not be in the same situation: the decider might only be able to motivate her solution by invoking moral reasons and principles, but the reasons why the solution/law will have to be respected and obeyed are not the reasons why she reached it in first place, those former reasons having to do with the actual person of the judge, *a legal authority and source of law*, herself. We have no reasons not to think that the rule of recognition allows “the judge says so” to act as reason independent of all other considerations, meaning that a decision need not necessarily always be understandable (to its objects) or defensible by exclusive appeals to other legal principles in order to be authoritative. Legal systems award judges the power to create law. In such conditions, legal subjects’ reasons [to obey] will not coincide with legal authority’s reasons [to impose] and Coleman is vindicated. Between the fact that reasons will not necessarily coincide, and the probability that confusion will be restricted to extraordinary legal issues, it is conceivable that a universe in which incorporationism and the NJT are at least somewhat compatible is this one.

Conversely, we are dealing with equal amounts of uncertainty. ELP believes the incorporation thesis to promote uncertainty by creating multi-level confusion amongst players in legal systems who will not know what are the morally best legal options, or will not understand their legal verdicts because they are the results of moral considerations (as opposed to applications of the best fitted legal principle), or will find the rule of recognition “unconventional” and “unclear”. We have seen above that we do not believe this necessarily to be the case at all. On the other hand, we reject the whole premise of the counterargument; uncertainty is not the direct consequence of a rule of recognition that includes criteria of legal validity, it is an organic by-product in any legal universe in which there is too much law, too little law, too unclear law or no law. Uncertainty is not from or about secondary rules, it is from or

³⁴⁶ In “Lecture 9” in *The Practice of Principles*.

about problematic – either in content or application – primary rules that secondary ones are expected to rectify. As such, when ELP discusses uncertainty what they really try to convey is that they believe that in an inclusive legal system there will be less “solution” to legal problems.

This brings us to the third point: there is no way to quantify solution in either type of legal system and compare them, especially not abstractedly. Chances are that for a significant interval – covering all legal instances where applying law is not an exercise of considerable difficulty – solution levels will be equal. Most likely, they will remain levelled all the way through the exhaustion of all possible sources of knowledge about the law, up to and including the most competent legal authority in the state. Uncertainty/ no solution will thus likely begin only at the end of law, at the outer limits of the usefulness of the rule of recognition. The case ELP would probably make here is that its more fixed, more focused on sources, rule will cover more of the space between *T1criticallylowlevelusefulness* and *T0uncertainty* (the idea being that its rule will provide more information, more guidance, more direction and thus survive doubts for a longer period of time). We have no reasons to believe them in this, however. ILP does not argue the rule in a way that reveals that they hold it to be somehow less fixed, less clear, less source-focused than the exclusive rule; all they do is an addition. ILP’s rule is therefore more, not less, and while what it has in addition could potentially be problematic past the point of certainty, it could also be a saving grace where their opponent’s rule has nothing left to offer. So, ironically, ELP’s case for their rule being more useful than the inclusive rule is actually more intuitively appealing upon considering day-to-day legislation and adjudication, when a [arguably but most likely falsely] more detailed rule providing more direction could fare better, than when considered in the perimeter of genuine uncertainty and no solution. Once the line is crossed into that territory, it actually stands to reason that a rule that includes an additional permission could still have some answers or solutions when the other has fallen silent. Thus, on taking account that 1) uncertainty is a systemic problem, not a symptom of a problematic rule, and that 2) the inclusive rule of recognition gives absolutely no evidence of being less exhaustive, less instructive or significantly less source-centric than the exclusive one, the only difference between the two being the inclusion of moral principles into the criteria of legal validity, something that could produce effects only in the exceptional circumstances at the end of law, and that 3) there is no method to empirically test which rule ends first or

confuses first or falls silent first, then ELP's claim that ILP will bring about fewer solutions is an empty accusation. The entire situation is comparable to a gin-rummy game when one player has 15 cards and the other 14: in the absence of perfect knowledge of all cards and all available moves we can neither settle which of them is better off nor claim, with any measure of certainty, that the player in possession of 15 cards is in the inferior position (the card could equally be a mismatched game buster or the joker).

Exclusive legal positivism thus demonstrates a readiness to be very theoretically unforgiving towards their inclusive counterparts, more often than not reading their claims in an extreme fashion. Motivated by what is clear bias resulting from their desire to protect their thesis of authority from anything they perceive as damaging, ELP places inordinately heavy burdens of proof on inclusivism and makes heavy accusations of negating authoritativeness, facilitating uncertainty and epistemic failure, precluding conventions and so on without decisive evidence. ILP, however, as seen, can survive these criticisms with arguments from moderation and sufficiency.

Conclusion

In light of the discussion above there should be no doubt that claiming that "the law is moral" is decisively poisonous to [pretences of] authority is an unfounded accusation; law's authoritativeness is preserved, since rule-making, recognition, application and, above all, obedience, are not predicated on processes of moral evaluation. In this account of political obligation, law-subjects obey the law because it is the law, not because of its legal or moral excellency, not because of the positive consequences of law-abidance, but because of its pedigree. The account therefore meets the authoritativeness condition, and allows law to serve its epistemic functions. And we have already seen it to meet C6particularity, C3reasonable access to disobedience, and the C4*prima facie* requirement. None of the others are, in any conceivable way, an issue (including C7conformity, as none of my statements contradict practical realities or widely depart from ordinary philosophical opinions) and, above all, the justification proposes a clear source of normativity -that requires no supplementations of the kind that bring about doubts about the actual ground of

duty- and it is in no danger to degenerate.

Final Conclusions

The aim of this project was to demonstrate the necessary failure of existing accounts of political obligation to vindicate the supposed moral requirement to obey the laws of the state, and to suggest, in response, a new justification drawing on a source of duty previously ignored. More specifically, two salient questions were asked in the introduction: (1) if justifications fail to achieve their purposes, do they do so exclusively because of individually exhibited faults, or are there systemic errors, internal to the justificatory strategies themselves, that unavoidably preclude all paradigms in that specific vein from success, and, (2) are we-theoreticians of political obligation- consequently at a point at which entirely novel avenues towards justification have to be considered. To obtain my answer, on the basis of methodology setting firm criteria and standards for this kind of endeavour, I evaluated with a view towards establishing if proposed grounds have sufficient normative power to sustain a moral requirement of the magnitude of political obligation.

My evaluation followed the logical and chronological succession from voluntarism to non-voluntarism, from the straightforward vindications of the requirement in classic political obligation accounts to the newer arguments for it as the predicate of a natural duty. Transactional accounts were the first to be assessed. Setting aside express consent as the infamous perfect source of political obligation with no correspondence in the real world, I focused on various interpretations of tacit consent, and modern takes on the concept. I found that, in its most honestly Lockean reading, tacit consent entertained as weak a connection to the realities of everyday political life as its celebrated brother. Conversely, arguments about tacit consent as residence and voting did not struggle with the charge, but avoiding previous issues came at the price of accusations of not being authentically consensual, or amounting to consent to obligation at all: though more than one criticism could be formulated against the argument from residence, what really sank it was consent-or-leave's inability to pass the bar of sufficient freedom for it to count as a genuinely free, morally permissible choice situation; as for the argument from voting, failure was the direct consequence of mistaking it for a source of duty, when voting is just one element of the package of privileges and responsibilities the state awards those under its jurisdiction on an assumption it is justifiably entitled to do so in relation with that

specific group. Finally, modern consent accounts, though theoretically interesting in their attempts to circumvent issues of materialization and concreteness by rendering assent hypothetical, proved to be faux consensual, and therefore trapped in a space between theses of authority without political obligation and unsuccessful natural duty explanations. The general conclusion was that classic consent is an impeccable but unrealistic source of political obligation that modern consent, deprived of its elementary features of knowledge and intentionality, could not replace: when removed from the domain of actuality, consent lost too much of its essence to be able to sustain a requirement to obey. A consensual grammatical move had not translated into sufficient consent.

Rawls' principle of fairness ran into some of the same problems when trying to repair Hart's original mistake of not setting down firm criteria for membership and restrictions in benefaction: though his proposed solution of "acceptance" was as competent, on paper, as consent, it was also as absent. As for Klosko, his effort to skirt these issues remains the best explanation of political obligation to date, but its inability to categorically establish obedience as the only form of fair reciprocation is a systemic fault impossible to repair unless returning to the logic of contract, and thus to the previous problem of undiscoverable will. Together with that accompanying issue of alternative supply, they allowed a finding that principle of fairness constructions did not and could not function as proper justifications.

Non-voluntary associative accounts of political obligation were the subject of the third chapter. Associativism revealed itself to also be a paradigm plagued by systemic faults. Between its readiness to discover sufficient role-sourced justification in relational positions, its conviction that attachments generate obligations, its arguing that identity formation is predicated on citizenship to such degree that non-performance would cause psychological trauma, and its readiness to view practices as fully normative independent, it exposed itself to devastating charges of confusion, parasitism, insufficiency and degeneration. Associativism assumed political obligation to be part and parcel of the role of citizen without considering whether or not this is evidence that acts of required submission are justified, or if compliance genuinely flows from the role itself, rather than from one of the higher order moral principle applicable to the diluted relationship between members of the body politics. These were and are its systemic faults, and they prevent associativism from justifying obedience as the compulsory correlative of a right against citizens and compatriots.

Chapter IV dealt with natural duty accounts. Though coping with non-voluntarism better than associativism, their general opinion that political obligation is the one avenue towards the satisfaction of some duty brought about two insurmountable obstacles: a challenge from content and a challenge from precise inclusion, denying particularly. No account in this category managed to avoid or resolve them, since proponents could not come up with sufficiently correct moral reasons to permit excluding other predicates for the duty, and to restrict institutional application. Consequently, they could not produce exclusionary reasons as to “why obedience” and “why us”, thus maximally imposing a duty that was not clearly one to surrender, on a group of people not obviously demarcated by borders. Natural duties accounts therefore exhibit structural flaws that endorse my original hypothesis.

At last, in chapter V I presented my own non-voluntary account of political obligation as a now necessary step forward that draws not on a feature of the state or of the citizen body, but on law itself, its nature and its acts. I argued political obligation to be a special relationship between us and *the law*, moral agent to moral agent, and a consequence of law bestowing us with moral rights and responsibilities, as citizen members of new moral relationship. I then defended this justification of the moral requirement to obey as allowing the concept to retain all its salient features, as meeting all the criteria set in the methodology, and as able to survive not only all the criticisms that crippled previous efforts, but also exclusive positivist opinions that assumptions that the law is moral in nature are incompatible with authoritativeness and well-performed epistemic functions and adjudication.

In the wake of my examination, I find that both questions asked in the introduction are answered in the affirmative, and that my hypothesis holds: we are at the end of efforts to defend political obligation as we know them, a *status quo* brought about by evidence that all models of justifications are plagued by systemic issues, ensuing directly from one or more of their core claims or inner logics, for which there are and can be no rectifications; and, *ceteris paribus*, we require new paradigms that now, having excluded voluntarism and witnessed arguments from special features of states, citizens or groups to be insufficient, ought to focus on the third element of the relationship of political obligation, the law, and argue in non-voluntarily fashion from one of its aspects. In summary I find we have conclusive reasons to declare existing justifications of political obligations disappointing and to start anew from the ground I

suggest, the proven only remaining option for those that want to persist in efforts to vindicate *de jure* authority in possession of a power right.

Concerns about political obligation were and continue to be important. The fact that, independently of the absence of justification, citizens routinely comply with the legal demands of their institutions does not deprive the issue of moral and theoretical significance. While obedience may be now considered, by and large, somewhat morally sanctioned by more modest theses of authority, and the concept of legitimacy is being stretched so as to at least partially cover *de facto* authorities, it remains true that the surrender states claim and believe in, and on the basis of which they operate is fictional, as are a vast majority of the opinions institutions and citizens have on the relationship that exists between them. States and their political agents consistently defend their actions by invoking supposed moral permissions they hold in virtue of being historically, legally, internationally recognized as legitimately authorities groups of people they settle with rights and obligations and who consequently comply. But, at a most basic level, this remains one of the world's most enduring, most pervasive, most consequential instance of collective delusion. In comparison to the demands and deliveries of political obligation, the piecemeal acts of obedience Kantian authority accounts or Raz's normal justification thesis can and do explain are small instantiations of truth in a broader picture of speculation. True authority and obligation, understood simply as our having to do what the law demands because it is the right of institutions to demand it, are absent from the moral universe, even though highly taxing and limiting in reality. This anomaly, on whose basis much of what we do and think politically rests, requires reparation though vindication, especially in the absence of exit options, permissions to manifest in ways other than compliance, and recognized alternative supply.

My recommendation for future efforts in the field is to persist in the direction of political obligation but to do so judiciously, here defined primarily as approaching the issue in fashion conscious of the criteria and recommendations set in the methodology, and of the bar that must be cleared in order for a justification to count as an appropriate argument for political authority correlative to political obligation. And identifying other sources of normativity is equally imperative, as the grounds of obligation already recognized in the literature have been fully explored and have emphatically been revealed not to have sufficient force to sustain a duty to obey. Insisting on old paradigms is not going to yield better results, experience having made

it clear that what is taken out cannot properly be replaced, and what is added uniformly becomes problematic in more than one way. Law and its aspects is therefore the route to go, at least until, at the end of due diligence, it can be definitively concluded that none of its aspects are conducive to political obligation.

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